

A Comparison of United States, Colombian and Peruvian Domestic Law on Terrorism

*Are We Becoming More Like Our Neighbors to the South?*

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## **A Comparison of United States, Colombian and Peruvian Domestic Law on Terrorism**

### ***Are We Becoming More Like Our Neighbors to the South?***

#### **I. INTRODUCTION**

While walking through the Plaza de Armas of Huacho, Peru in 1989 I had the unique displeasure of being a witness to a car bomb explosion approximately seventy-five yards away. I felt the blast, heard the screams (not just of the intended victims, but of the indirect victims during the first moments of panic), and watched the terror that quickly spread through the plaza that Sunday evening. Only moments before, scores of people had been enjoying a small reprieve from their chaotic lives. During the late 1980s and early 1990s, Peruvians were no strangers to car bombs, slayings of their government officials, power outages caused by exploding electricity towers, and so forth. But in spite of that history and perceived nonchalance with respect to it, everyone in the plaza that evening was indeed terrified, and justifiably so.

At that time in Peru, there were two primary terrorist organizations in operation.<sup>2</sup> The larger of the two was the Maoist, Communist Sendero Luminoso [Shining Path] organization.<sup>3</sup> The second was the Cuban-rebel group known as the Movimiento Revolucionario Tupac Amaru (MRTA) [Tupac Amaru Revolutionary Movement].<sup>4</sup>

In neighboring Colombia, the country had also undergone years of terrorist violence, the majority of which was conducted by two separate organizations, with the recent addition of a

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The author lived for two years in Peru, from April 1988 to February 1990.

<sup>2</sup> See Council on Foreign Relations, *Terrorism Q & A, Shining Path, Tupac Amaru, (Peru, leftists)* (2004)), at <http://cfrterrorism.org/groups/shiningpath.html> (last visited May 20, 2005) [hereinafter Council on Foreign Relations-Peru].

<sup>3</sup> Id.

<sup>4</sup> Id.



third. The largest of the three is the Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo (FARC) [Revolutionary Armed Forces of Colombia-The People's Army].<sup>5</sup> The second leftist organization and the smaller of the two is the Ejército de Liberación Nacional (ELN) [National Liberation Army].<sup>6</sup> In contrast to the two well-established leftist organizations, Colombia is now also plagued by a right-wing paramilitary (terrorist) organization: the Autodefensas Unidas de Colombia (AUC) [United Self-Defenses Forces of Colombia].<sup>7</sup>

To most citizens of the United States, the major difference between the terrorism in Peru and that in Colombia is that the Colombian terrorism is really a large cocaine operation, which uses terrorism as one of its methods of survival and promotion. Though that may be true to an extent, the terrorism in Colombia may not be so starkly different from that in Peru. The leftist Colombian organizations are formally based on political ideals, and (while neither admits to the use of drug trafficking for the funding of their operations) use drug trafficking as a means of survival and economic viability in order to follow their political agendas.<sup>8</sup> Rogue paramilitary groups, on the other hand, originally established the AUC as armed protection against the other two established terrorist organizations.<sup>9</sup>

Thus, at least to a degree, both the Peruvian and Colombian terrorist groups are related in their political motivations and means of operation. They are not true "criminal organizations," but rather political organizations that use crime to further their purpose. Their aim is the

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<sup>5</sup> See Council on Foreign Relations, *Terrorism Q & A, FARC, ELN, AUC, Colombia, Rebels* (2004) (last visited May 20, 2005), at [http://cfrterrorism.org/groups/farc\\_print.html](http://cfrterrorism.org/groups/farc_print.html) [hereinafter Council on Foreign Relations-Colombia].

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

influence of government and political gain. This differentiates them from other organizations involved in criminal activity that do so purely for monetary or physical gain.

Likewise, those terrorist organizations bent on influencing the United States' government's policies are also politically motivated, al Qaida currently being the chief among them. Yes, al Qaida and other terrorist organizations may confuse the political issues by engaging in overt hate-speech directed towards the United States government and citizens, but the heart of their arguments is political. That thread of political motivation (as well as the political opposition thereto) is important in the way it affects the legislation passed and presidential decrees ordered in the United States, Peru, and Colombia in opposition to terrorism.

Additionally, and perhaps regardless of the political motivations of the terrorists, responses to terrorism are often sparked not by hatred or fear of the beliefs the terrorists espouse, but rather hatred and fear of the terrorist *tactics* employed. In that sense, the responses to terrorist activities in the United States, Colombia and Peru are directly related.

Hence, this paper will intend to show that there is a subtle similarity amongst the legal responses to terrorism in the United States and those of Peru and Colombia. The United States has long had a feeling of legal and legislative superiority to our neighbors to the south that may now be partially unfounded. One would hope that even in the face of rising terrorist attacks on the United States, the United States would lead the world in a logical, tempered legislative and executive attack on terrorism rather than resorting to the lowest common denominator. Such hope may be somewhat misplaced and a new balance between adherence to law and protection of the citizens of this great country must be sought.

As will be discussed below, in both Peru and Colombia, the civilian populations had agreed to hard and arguably unconventional methods to fight terrorism after years of enduring

massacres, bombings, kidnappings, etc. Both populations elected presidents who were willing to sidestep “bureaucracy” and conventional laws to erect their hard-line agendas aimed at halting the violence in their respective countries, apparently at all costs but the loss of their own presidencies. At least twice and perhaps three times the Peruvians elected President Fujimori, and two of those elections occurred after he had initiated and carried out his “Fujigolpe.”<sup>10</sup> How could Peruvians and Colombians allow such deviance from conventional law? How could the rather rapid collapse of governmental norms occur with the apparent approval of the people? And with those questions in mind, the appropriate question may well be, are the people of the United States (perhaps to a lesser degree) allowing the same deterioration of law and strengthening of the executive branch to occur in the name of combating terrorism in this country?

President Fujimori was a freely elected president who quickly expanded his power to perhaps unforeseen dimensions (at least unforeseen by the international community). He played on the fears and frustration of the Peruvian people and became both one of the most dictatorial and successful presidents in that country’s history. President Uribe was likewise elected freely by the Colombian people and, while not to the same degree as Fujimori, has begun slowly to usurp the authority of the Colombian Congress and expand the power of the executive branch with the support of the Colombian populace.

President Bush was freely elected and, perhaps more importantly in light of the attacks of September eleventh, reelected on a harsh, antiterrorism platform. The abuses at Abu Gharaib, allegations of torture carried out upon suspected terrorists and the incarceration of hundreds of “detainees” at Guantanamo which all occurred during his first term in office did not sway the

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<sup>10</sup> Fundación CIDOB-Fujimori, *infra* note 44.

public away from supporting him in record numbers for his reelection. In fact, that may have contributed to the support he did receive.

While it should be acknowledged that with the constitutional and legal history of the United States to date, there is no real threat the executive branch will engage in tactics like the Fujigolpe (discussed below) which occurred in Peru, there are still reasons for concern. The examples in Colombia and Peru, cited herein, are evidence that oftentimes a country imperiled by terrorism may either use its legislation to grant greater power to the executive than the executive branch enjoyed previously, or it may approve the unilateral actions of the executive branch that have that same result. In either case, the expansion of the role of the executive branch in the country's government often leads to a slow stifling of the basic rights people in that country were previously entitled in order to quash the terrorism plaguing the country. And while the terrorism itself is obviously a threat to the individuals of Colombia, Peru, and the United States, so is the erosion of the rights which protect us from

Finally, the Peruvian and Colombian legislation, orders and decrees cited in this paper will be viewed in light of and in comparison to the legal norms of the United States, and not necessarily to the legal norms of Peru and Colombia. This is done in an effort to show not that Peruvian and Colombian law is or is not acceptable to Peruvians and Colombians, but to show that the United States has grown closer to leveling itself legally with Peru and Colombia instead of maintaining an arguably higher level of normative integrity.

Section II of this paper will provide a background for the legislative reactions to terrorism. This will necessitate a brief recounting of terrorism and its roots in Peru, Colombia, and the United States, followed by a summary comparison of the three histories.

Section III will then begin to explain the respective legal responses to terrorism in each of the three countries, focusing on some of the recent United States laws and orders. The discussion will be divided into, essentially, laws affecting the investigation of terrorists and laws affecting the prosecution of terrorists, with the resultant effects of those laws.

## II. Historical Background

### A. *Peru*

As stated above, for over two decades Peru has been afflicted by two primary terrorist organizations, the Shining Path and the MRTA. Both organizations find their roots in Communism, though there are a number of differences between the two in the finer points of their philosophy and operating procedures.

#### *Shining Path*

The larger of the two organizations, the Shining Path, began as an offshoot to the Partido Comunista Del Perú (“PCP”) (Communist Party of Peru).<sup>12</sup> Abimael Guzmán, a university professor, emerged as the leader of the Shining Path and began plans to replace the government of Peru with a Maoist, peasant revolutionary authority.<sup>13</sup> To do so the group began forming in the most poverty-stricken areas of Peru in the Andes, gaining control of the student councils in the Tacna and Huanaco Universities, as well as gaining influence in the University of Engineering and San Martin de Porres Universities in Lima.<sup>14</sup>

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<sup>11</sup> Council on Foreign Relations, *supra* note 2.

<sup>12</sup> See Wikipedia, the Free Encyclopedia, *Shining Path*, at [http://en.wikipedia.org/wiki/Shining\\_Path](http://en.wikipedia.org/wiki/Shining_Path) (last modified Mar. 7, 2005) [hereinafter Wikipedia-Peru].

<sup>13</sup> Council on Foreign Relations, *supra* note 2.

<sup>14</sup> Wikipedia-Peru, *supra* note 12.

In 1980, Shining Path began the new decade by leaving the classroom and commencing armed operations. It was no coincidence that in 1980 the military government was to allow the first free elections to occur in the previous twelve years.<sup>15</sup> Shining Path refused to participate in the elections and, instead, attempted to disrupt them.<sup>16</sup> On the eve of the elections, Shining Path members burned ballot boxes and attacked election sites.<sup>17</sup> These initial acts, while successful operationally, did not bring them the press coverage the organization sought.<sup>18</sup>

On a political level, Shining Path originally set out to win the hearts of the people by providing them with the necessities of life of which they had been allegedly deprived by the current government, located a figurative world away in the capital city of Lima.<sup>19</sup> Until the election of Alejandro Toledo in 2000 (and arguably with the election of Fujimori in 1990), the central government in Peru had been representative more of the ruling class than of the impoverished peasantry.<sup>20</sup> The major difference between the one class and the other was the amount of Spanish blood running through the veins of the privileged class's members.

Thus, as is often the case with rebellion, the Shining Path promised to provide the people with an authority that would give them the basic functions of government in exchange for the population's allegiance to the cause. Any disloyalty was punished quickly and ignominiously to

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Council on Foreign Relations, *supra* note 2.

<sup>20</sup> See Wikipedia, the Free Encyclopedia, *Alberto Fujimori*, at [http://en.wikipedia.org/wiki/Alberto\\_Fujimori](http://en.wikipedia.org/wiki/Alberto_Fujimori) (last modified Mar. 6, 2005) [hereinafter *Wikipedia-Fujimori*].

discourage further infidelity. In one particularly brutal case, “the insurgents hung women on the wall and hacked them with knives and machetes before slitting their throats.”<sup>21</sup>

From the point of its inception to the 1980s, the Shining Path was content to stay in the mountains recruiting its members and building a base of wealth and supplies which it would need in the future for the assault on Lima.<sup>22</sup> As perhaps a confirmation of the governmental apathy upon which the Shining Path was based, the central government paid little attention to the group’s actions during that period.<sup>23</sup> The majority of the Peruvian population had migrated to Lima and the central government catered to that majority.

In an effort to bolster its influence, in the late 1980s the Shining Path began slowly moving its rebellion towards Peru’s coast and Lima. Lima received its electricity through a series of lines streaming from the north, supported by large metal towers. The towers were located in hard to reach areas and were easy targets for the rebels. The bombing of one of these towers could reduce electricity in a number of cities at once and repairing the towers would often take days. In the late 1980s such bombings occurred frequently and with the results Shining Path had hoped for.<sup>24</sup> The capital city’s population was annoyed. The terrorists were getting Lima’s attention.

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<sup>21</sup> Major James V. Huston, *Insurgency in Peru: The Shining Path*, Marine Corps Command and Staff College (May 11, 1988), available at <http://www.globalsecurity.org/military/library/report/1988/HJV.htm> (last visited May 20, 2005) (quoting *Rebels Kill 3 Sisters for Aiding Peru Army*, L.A. TIMES, Apr. 30 1988, § 1, at 11.).

<sup>22</sup> Wikipedia-Peru, *supra* note 12.

<sup>23</sup> Alberto Bolivar Ocampo, *Intelligence and Subversion in Peru*, Potomac Institute for Policy Studies, Center for Counter Terrorism Studies, Aug. 12 1999, <http://www.terrorismcentral.com/Library/Conferences/Conferences1999/CTS21-LABolivarOcampo.html> (last visited May 20, 2005).

<sup>24</sup> Wikipedia-Peru, *supra* note 12.

Then, in 1992, the Shining Path detonated a car bomb in Lima's financial district of Miraflores, killing nearly 40 civilians.<sup>25</sup> That bomb was followed successively and successfully by a stream of others in Miraflores, though most of them less lethal.<sup>26</sup> By attacking the heart of the financial district in a country already on its economic knees, the Shining Path had the full attention of the majority of the population of Peru as well as the central government. This rise in infamy and temporary influence would be the downfall of the Shining Path, as discussed below. Currently the Sendero Luminoso boasts no more than 500 members.<sup>27</sup>

ii. *MRTA*

Simultaneously, the MRTA was at work to establish its own communist government in Peru.<sup>28</sup> The MRTA thought the Shining Path to be traitors to its Marxist communist movement and were constantly competing for the type of publicity the Shining Path had garnered.<sup>29</sup> In comparison, the MRTA was much smaller; the Shining Path during the late 1980s had thousands of members, while the MRTA could count only hundreds.<sup>30</sup> The MRTA also competed with the Shining Path for its financial base that was largely gained by "taxing" the local cocaine farmers.<sup>31</sup>

Finally, the MRTA was not known to be as violent as the Shining Path. While the Shining Path was infamous for hacking its victims to death with machetes and for public

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See Global Security.org, *Sendero Luminoso (SL) – Shining Path*, at [http://www.globalsecurity.org/military/world/para/sendero\\_luminoso.htm](http://www.globalsecurity.org/military/world/para/sendero_luminoso.htm) (last modified May 9, 2005).

<sup>28</sup> Council on Foreign Relations-Peru, *supra* note 2.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*



hangings for any type of disloyalty to the cause, the MRTA desired more of a Robin Hood reputation that would have been thwarted by overly violent behavior.<sup>32</sup>

The MRTA's most famous terrorist attack was the 1996-1997 assault on the Japanese ambassador's residence in Lima.<sup>33</sup> The ambassador was hosting a dinner attended by over four hundred foreign and domestic diplomats.<sup>34</sup> It was no coincidence the Japanese ambassador's residence was the target of the attack as Alberto Fujimori, the Peruvian President at the time, was of Japanese descent.<sup>35</sup>

MRTA leadership held the guests hostage at the residence for four months.<sup>36</sup> The standoff ended with Peruvian police storming the residence through tunnels constructed secretly over the period of months.<sup>37</sup> Most of the MRTA leaders were killed during the raid.<sup>38</sup>

### iii. *President Fujimori*

In 1990, Alberto Fujimori defeated Mario Vargas Llosa in an election that would prove to be momentous for the Peruvian fight against terrorism. President Alan Garcia, whose departure from office created the vacancy for Alberto Fujimori, had been, in relation to the success President Fujimori eventually had, ineffective in fighting the terrorists and had lost most of the public support that had put him into office.<sup>39</sup> President Fujimori would not. Fujimori did not run

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<sup>32</sup> *Id.*

<sup>33</sup> See generally Dr. Ramee K. L. Panjabi, *Terror at the Emperor's Birthday Party: An Analysis of the Hostage-Taking Incident at the Japanese Embassy in Lima, Peru*, 16 Dick. J. Int'l L. 1 (1997).

<sup>34</sup> *Id.* at 15.

<sup>35</sup> *Id.* at 8

*Id.* at 43

<sup>37</sup> *Id.* at 43, 44.

<sup>38</sup> *Id.*

<sup>39</sup> Wikipedia-Fujimori, *supra* note 20.

on an antiterrorism platform, but rather on that of “[w]ork, technology, honesty.”<sup>40</sup> Upon election he catapulted Peru into an economic recovery dubbed “Fujishock” under the tutelage of the International Monetary Fund, and brought Peru back into the international market.<sup>41</sup> Though successful on the economic front, the situation developing in Peru necessitated taking an antiterrorism position early in his presidency in order to retain the momentum that got him elected.

As a result of the security and financial situations in Peru at the time, Peruvians were perhaps more willing than they would otherwise have been to accept the means Fujimori employed to combat those issues. In the most drastic of his measures, early in his first term he eliminated the Peruvian Congress in what was effectively a coup d’etat, also termed the “Fujicoup” or, in Spanish, “Fujigolpe.”<sup>42</sup> In spite of such a drastic measure, public response to the coup showed seventy-three percent of Peruvians supported it.<sup>43</sup> In his address to the public the morning following the coup, Fujimori cited the need to dissolve an “inoperative” congress plagued by corruption and connections to terrorists and drug traffickers.<sup>44</sup> After the coup, Fujimori established a unicameral congress made up mostly of his supporters. This formed the legislative basis for his “reforms.”<sup>45</sup>

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<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> Fundación CIDOB, Centro de Investigación, Docencia, Documentación y Divulgación de Relaciones Internacionales y Desarrollo (Research, Teaching, Documentation, and Dissemination Center for International Relations and Developments), *Alberto Fujimori*, at <http://www.cidob.org/bios/castellano/lideres/f-019.htm> (in Spanish) (last modified Mar. 30 2001) [hereinafter CIDOB-Fujimori].

<sup>45</sup> Id.

## B. Colombia

Though Colombia is home to many more than three terrorist organizations, this paper will discuss the most influential and those which have the largest memberships: the FARC; the lesser known ELN which, though markedly smaller, has been in operation as long as the FARC; and the youngest of the three, the AUC.

### i. FARC

In 1964, militant communists and peasant self-defense groups combined to form the FARC as part of the paramilitary wing of the Partido Comunista de Colombia (PCC) [Colombian Communist Party].<sup>46</sup> The FARC claims to represent the rural poor in Colombia and, true to its communist routes, despises all things American, to include its corporations and the privatization of natural resources.<sup>47</sup>

The FARC is well equipped. Its membership has fluctuated over the years, but the FARC has somewhere between 9,000 and 12,000 members.<sup>48</sup> The FARC operates in large areas of Colombia,<sup>49</sup> with occasional operations pouring over Colombian borders into Venezuela, Ecuador, and Panama.<sup>50</sup>

In 1999, as part of the peace talks with President Andres Pastrana, President Pastrana ceded a large portion (42,000 square kilometers) of the Colombian jungle to the FARC in an

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<sup>46</sup> See Global Security.org, *Revolutionary Armed Forces of Colombia - Fuerzas Armadas Revolucionarias de Colombia – FARC*, at <http://www.globalsecurity.org/military/world/para/farc.htm> (last modified Mar. 23, 2005) [hereinafter Global Security-FARC].

<sup>47</sup> See Wikipedia, the Free Encyclopedia, *FARC*, at <http://en.wikipedia.org/wiki/FARC> (last modified Apr. 17, 2005) [hereinafter Wikipedia-FARC].

<sup>48</sup> Id.; Global Security-FARC, *supra* note 46.

<sup>49</sup> Council on Foreign Relations-Colombia, *supra* note 5.

<sup>50</sup> Global Security-FARC, *supra* note 46.

attempt to find a common middle ground and satisfy some of the group's demands.<sup>51</sup> Three years later, President Pastrana gave the order to his military to begin to take the ceded territory

The FARC, in spite of the generous gift, had been unwilling to comply with government settlement proposals.<sup>52</sup> The FARC had apparently been using the ceded territory as a safe haven to export arms, to engage in drug trafficking and kidnappings, and to strengthen its military force.<sup>53</sup>

Since its beginnings and recently at an accelerated pace, the FARC has engaged in terrorist activities. The FARC is responsible for the majority of the ransom kidnappings that occur in Colombia, targeting mostly the wealthy and diplomats (be they domestic or international).<sup>54</sup> Notably, the FARC kidnapped Ingrid Betancourt, a Colombian presidential candidate in 2002,<sup>55</sup> and kidnapped and assassinated a former Colombian minister of culture in 2001.<sup>56</sup> In 2003, a plane carrying four Americans and a Colombian crashed near FARC occupied territory. The FARC killed the Colombian and one of the Americans and continues to hold the remaining three, ostensibly for ransom.<sup>57</sup>

In addition to the kidnappings, the FARC, similar to the Sendero Luminoso, has also used bombing campaigns resulting in the deaths of numerous civilians.<sup>58</sup> It is estimated the FARC

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<sup>51</sup> Council on Foreign Relations-Colombia, *supra* note 5.

<sup>52</sup> Wikipedia-FARC, *supra* note 47.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Council on Foreign Relations-Colombia, *supra* note 5.

*Id.*

<sup>57</sup> Global Security-FARC, *supra* note 46.

<sup>58</sup> Council on Foreign Relations-Colombia, *supra* note 5.

and ELN are responsible for approximately fifteen percent of the 3500 civilian deaths that take place in Colombia each year as a result of the ongoing internal struggles.<sup>59</sup> In 2003 FARC operations included several bombings including a car bombing in a nightclub in Bogotá that killed thirty-five civilians (including six children) and wounded over 170 others.<sup>60</sup>

In 2004, the FARC confessed to having assassinated a large number of civilians for their alleged support of right wing paramilitary groups or because they had attempted to return to their lands after having been displaced by the FARC.<sup>61</sup> In one such massacre, 34 coca farmers were found killed with automatic weapons. The farmers' hands and feet had been bound.<sup>62</sup>

The FARC receives much of its funding from kidnappings, receives at least half of its funds from the illegal drug trade (either by direct participation or protection of the drug cartels) and additional money through "taxes" on the civilians living in FARC-controlled areas. Due to its membership, political influence and terrorist activities spanning four decades, the FARC is truly one of the most feared and effective terrorist organizations currently operating.

ii. *ELN*

Though similar in operations, one of the major differences between the ELN and FARC organizations is the role politics plays in each. In 1963, a combination of students, Catholic radicals, and left-wing intellectuals formed to initiate a movement in Colombia similar to that of

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<sup>59</sup> *Id.*

<sup>60</sup> See Bureau of Democracy, Human Rights and Labor, *Colombia – Country Reports on Human Rights Practices, 2003*, § 1.g (Feb. 25, 2004), <http://www.state.gov/g/drl/rls/hrrpt/2003/27891.htm> (last visited May 20, 2005) [hereinafter Bureau of Democracy-2003].

<sup>61</sup> See Bureau of Democracy, Human Rights and Labor, *Colombia – Country Reports on Human Rights Practices, 2004*, § 1.g. (Feb. 28, 2005), <http://www.state.gov/g/drl/rls/hrrpt/2004/41754.htm> (last visited May 20, 2005) [hereinafter Bureau of Democracy-2004].

<sup>62</sup> *Id.*; Wikipedia-FARC, *supra* note 47.

Fidel Castro in Cuba.<sup>63</sup> Throughout its existence, the organization has attempted to remain true to its political roots and resents the FARC and the threat it represents to its power, both financial and political.<sup>64</sup> The ELN has somewhere between 3000 and 5000 members, nearly half the size of the FARC. Likewise, though the ELN engaged in negotiations with President Pastrana for a safe haven similar to that granted to the FARC, the request was ultimately refused.<sup>65</sup> Similar to the relationship between the MRTA and Shining Path in Peru, the ELN resents the FARC for allegedly abandoning the heart of the communist movement in exchange for greater financial power.<sup>66</sup>

The ELN also uses ransom kidnappings, bombing campaigns and extortion for its income and to further its political agenda.<sup>67</sup> In one of its 2004 kidnappings for ransom, ELN members killed the victim in spite of payment of the ransom.<sup>68</sup> The ELN carried out other kidnappings, however, to send a message (in one case literally<sup>69</sup>) to President Uribe, rather than for economic reasons only.<sup>70</sup> The ELN, perhaps in order to remain in contention for power in comparison to

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<sup>63</sup> Council on Foreign Relations-Colombia, *supra* note 5.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See Global Security.org, *Ejército de Liberación Nacional – ELN – National Liberation Army*, at <http://www.globalsecurity.org/military/world/para/elc.htm> (last modified Mar. 15, 2004) [hereinafter Global Security-ELN].

<sup>68</sup> Bureau of Democracy-2004, *supra* note 61, § 1.b.

<sup>69</sup> *Id.* (ELN members kidnapped Roman Catholic Bishop Misel Vacca in an effort to get him to deliver a political message to the government).

<sup>70</sup> *Id.* (ELN members kidnapped two individuals alleged to be relatives of President Uribe. The allegations of relationship were later found to be incorrect).

the FARC, has also recently entered the drug trade gaining much of its income through “taxation” of the cartels.<sup>71</sup>

In 2004, The FARC and ELN entered into a type of solidarity agreement against the Colombian military and have vowed to each other not to enter into peace negotiations with the Colombian government.<sup>72</sup> But in comparison to the FARC, the ELN has been far less influential and respected. The FARC’s success in the drug trade and the larger numbers of recruits that trade has allegedly brought has overshadowed the ELN and limited its success.

### iii. AUC

Formed in 1997, the AUC is the alleged antithesis of the FARC and ELN organizations. The AUC began as a way to unite right-wing paramilitary organizations in protection of the Colombian population against the FARC and ELN.<sup>73</sup> It has since equaled and arguably surpassed its competition in terror and brutality, and was added to the U.S. State Department list of terrorist organizations in 2001 for its massacres, torture, and other human rights abuses.<sup>74</sup> According to some, the AUC is responsible for seventy-five percent of the civilian deaths that occur each year as part of the internal strife in Colombia.<sup>75</sup> While clashes with government

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<sup>71</sup> Global Security-ELN, *supra* note 67.

<sup>72</sup> Bureau of Democracy-Colombia, *supra* note 61, Introduction.

<sup>73</sup> See Wikipedia, the Free Encyclopedia, *Autodefensas Unidas de Colombia*, at [http://en.wikipedia.org/wiki/Autodefensas\\_Unidas\\_de\\_Colombia](http://en.wikipedia.org/wiki/Autodefensas_Unidas_de_Colombia) (last modified Apr. 18, 2005) [hereinafter Wikipedia-AUC].

<sup>74</sup> See Secretary Colin L. Powell, *Designation of the AUC As a Foreign Terrorist Organization*, (Sep. 10, 2001), <http://www.state.gov/secretary/former/powell/remarks/2001/4852.htm>; Office of Counterterrorism, Department of State, *Fact Sheet* (Mar. 23, 2005), <http://www.state.gov/s/ct/rls/fs/37191.htm> (last visited May 20, 2005); Wikipedia-AUC, *supra* note 73.

<sup>75</sup> Council on Foreign Relations-Colombia, *supra* note 5.

organizations are on the increase, historically the AUC has dedicated itself to the eradication of its terrorist brethren and either avoided and/or collaborated with the government in doing so.<sup>76</sup>

Obviously, terrorism in Colombia is not a recent institution. Like Peru, terrorist organizations have existed in Colombia for decades and have been a regular and horrid part of Colombian daily life. Similarly again, the fears and anger of the people led to the election of a “staunchly conservative”<sup>77</sup> president, Alvaro Uribe.

#### iv. *President Uribe*

In 2002, Alvaro Uribe was elected president of Colombia on an openly pro-war platform, vowing to get the upper hand on the terrorist groups.<sup>78</sup> As part of one of the newly elected President’s most controversial plans, his government would arm one million Colombian civilians who would participate in the defense of their country against the FARC, ELN, and AUC.<sup>79</sup> Uribe stated that the arming of ordinary citizens rather than the arming of bandits (an apparent allusion to the AUC) would stem the upsurge of violence in the country.<sup>80</sup>

Human rights groups and historians cringed at the idea. Previously, between 1995 and 1997, during Uribe’s tenure as governor of the province of Antioquía, Uribe openly supported paramilitary defense organizations.<sup>81</sup> These organizations quickly gained a reputation for human

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<sup>76</sup> *Id.*

<sup>77</sup> Karl Penhaul, *Weary Colombians Like Tough Candidate – Election Victory Likely – If He Survives*, SAN FRAN. CHRONICLE, May 24 2002, at A-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2002/05/24/MN243118.DTL> (last visited May 20, 2005).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*



rights abuses and murder and the organizations were later disbanded.<sup>82</sup> During President Uribe's election campaign, the AUC openly supported him as their candidate. The argument can be made, therefore, that Uribe has a history of using civilians to do his dirty work.<sup>83</sup> As he is bound by the law, he enlists the aid of those who can more easily avoid it to get the job done.

Colombians initially compared Uribe to both Clark Kent, and perhaps more ominously, to Alberto Fujimori.<sup>84</sup> In other words, the people of Colombia were looking for a savior in one man whose plan was to eliminate not only the bicameral Colombian Congress in favor of a less bureaucratic unicameral congress<sup>85</sup> (similar to actions by President Fujimori), but would also expand his executive authority to the direct oversight of a million civilians; his armed minions. Uribe argues, however, that the million armed civilians are more like the blue-helmet peacekeepers of the United Nations, even hoping that they would be designated as such by the international community.<sup>86</sup>

### *C. The United States of America*

#### *Domestic Terrorism*

Domestic terrorism in the United States does not compare exactly to domestic terrorism in Peru and Colombia. The major terrorist threats in Peru and Colombia are domestic threats, while those to the United States are currently international. However, that does not mean the United States has not been plagued during its past with terrorism initiated by citizens of the

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<sup>82</sup> Id.

<sup>83</sup> Fundación CIDOB, Centro de Investigación, Docencia, Documentación y Divulgación de Relaciones Internacionales y Desarrollo (Research, Teaching, Documentation, and Dissemination Center for International Relations and Developments), *Alvaro Uribe Vélez*, at <http://www.cidob.org/bios/castellano/lideres/u-002.htm> (in Spanish) (last modified Aug. 20, 2002) [hereinafter CIDOB-Uribe].

<sup>84</sup> Karl Penhal, *supra* note 77.

<sup>85</sup> Fundación CIDOB-Uribe, *supra* note 83.

<sup>86</sup> Id.

United States who, like the terrorists in Peru and Colombia, are inspired by political agendas or, unlike the terrorists in Peru and Colombia, environmental, racial, or religious agendas. Between 1980 and 1999, the FBI recorded 327 terrorist incidents or suspected terrorist incidents in the United States.<sup>87</sup> Of those, 239 were attributed to domestic terrorism.<sup>88</sup>

Leftist terrorist organizations were more prevalent in the United States during the 1970s and early 1980s.<sup>89</sup> The end of the Vietnam war and the downfall of the Soviet Union brought the demise of many of these groups; the end of the Vietnam war because the groups no longer had something to protest against, and the end of the Soviet Union because their communist ideology had lost its main supporter.<sup>90</sup>

In 1987, the leader of the United Freedom Front (UFF), a communist organization, was given a life sentence for the murder of a New Jersey police officer.<sup>91</sup> Prior to Thomas Manning's incarceration, the UFF had been on a spree of bombings, bank robberies and assaults.<sup>92</sup> Manning's conviction and that of other UFF leaders brought an end to the group's violent activities.<sup>93</sup>

On the other side of the political spectrum, violent right-wing organizations such as the Ku Klux Klan (KKK) have been around since before the Shining Path, MRTA, FARC, ELN, or

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<sup>87</sup> See World Conflict Quarterly, *Understanding Terrorism – International Terrorism in the United States*, at <http://www.globalterrorism101.com/UTInternationalTerrorisminUS.html> (last accessed Mar. 9, 2005).

<sup>88</sup> *Id.*

<sup>89</sup> See generally U.S. Department of Justice, Federal Bureau of Investigation, Counterterrorism Threat Assessment and Warning Unit Counterterrorism Division, *Terrorism in the United States*, at 29 (1999), available at <http://www.fbi.gov/publications/terror/terror99.pdf> (last visited May 20, 2005).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

Other terrorist organizations with similar radical racist views such as the Posse Comitatus, the Aryan Nations, and The Order carried out the same type of murder, and bank or armored car robberies in furtherance of their goals of government overthrow.<sup>94</sup>

On April 19, 1995, the largest terrorist attack to have theretofore taken place on United States soil occurred when Timothy McVeigh and Terry Nichols bombed the Alfred P. Murrah Federal Building in Oklahoma City, killing 168 people.<sup>95</sup> The bombing came in response to the United States government's deadly reaction to right-wing antigovernment groups at Ruby Ridge, Idaho and to the Branch Davidians near Waco, Texas.<sup>96</sup>

Recently there has been another trend in domestic terrorism in the U.S., with environmental and animal rights groups doing the majority of the damage. For example, in 1999, eight of the twelve terrorist incidents to occur in the U.S. were attributed to these groups.<sup>97</sup>

#### ii. *International Terrorism Directed at the United States*

As stated previously, the largest terrorist threat to the United States currently is not an internal but external threat, particularly within the last decade. A brief chronology of the major events follows:

On Feb. 26, 1993, the World Trade Center was bombed for the first time, killing six and wounding a thousand. The suspects were followers of Egyptian cleric Umar Abdul al-Rahman.<sup>98</sup>

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<sup>94</sup> Id. at 29, 30.

<sup>95</sup> Id. at 30.

<sup>96</sup> Id.

<sup>97</sup> Id.

<sup>98</sup> Office of the Historian, Bureau of Public Affairs, Dept. of State, *Significant Terrorist Incidents, 1961-2003: A Brief Chronology* (2003), at [http://fas.org/irp/threat/terror\\_chron.html](http://fas.org/irp/threat/terror_chron.html) (last visited May 20, 2005).

- On June 25, 1996 a truck bomb was detonated outside the Khobar Towers military housing unit in Dhahran, killing nineteen U.S. military personnel and wounding 515 others.<sup>99</sup>
- On Aug. 7, 1998 the U.S. Embassy in Nairobi, Kenya was bombed, apparently by Osama Bin Laden. Nearly 300 people were killed in the blast, to include 12 U.S. citizens. Five thousand Kenyans were injured. On that same day, a similar bomb was detonated at the U.S. Embassy in Dar es Salaam, Tanzania, killing ten people and wounding 77, including one U.S. citizen.<sup>100</sup>
- On Oct. 12, 2000, a small boat laden with explosives rammed the U.S.S. Cole docked in Aden, Yemen. The attack killed seventeen sailors and injured 39 others. Again, Osama Bin Laden's followers were suspected.<sup>101</sup>
- On Sep. 11, 2001, followers of Osama Bin Laden hijacked four aircraft. Two of the aircraft struck the World Trade Center towers in New York City, a third struck the Pentagon in Washington D.C., and the fourth crashed into an open field in Pennsylvania after its passengers received news of the other three hijackings and attacked the hijackers on their aircraft. In all, over 3000 people were killed in the day's attacks.<sup>102</sup>
- From 2002 to the present, after the U.S. invasions of Afghanistan and Iraq, there has been a steady stream of terrorist attacks against U.S. property, personnel, and interests in Afghanistan and Iraq by use of suicide bombers, mines, and missiles. Hundreds of Afghan, Iraqi and U.S. citizens have died as a result.<sup>103</sup>

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<sup>99</sup> Id.

<sup>100</sup> Id.

<sup>101</sup> Id.

<sup>102</sup> Id.

<sup>103</sup> Id.

### iii. *President George W. Bush*

Though President Bush was not elected initially on a national security platform, his reelection was apparently bolstered by his hard-line views on terrorism, terrorists, and protection of U.S. citizens.<sup>104</sup> Originally elected in 2000 and inaugurated in January 2001, President Bush's most formidable hurdle during his first year in office was the terrorist attacks of September 11 of that year. His response to the attacks was swift and unrelenting, continuing to the time this paper was written. President Bush initiated a "War on Terrorism" which would span the globe.

But the changes made here in the United States to legislation and policies are perhaps just as important. Though others may argue to the contrary, the lack of a decisive, harsh stance regarding terrorism and national security played a major role in John Kerry's defeat and President Bush's reelection.<sup>105</sup> Similar to both Fujimori and Uribe, President Bush has gained (or been given) executive power while in office, both political and legal.

## III. Legal Background

### A. *Essential Checks and Balances*

In 1787 the existing states at the time, by convention, drafted the Constitution of the United States. Contextually, the United States had just won its independence from the British in a bloody civil or revolutionary war, depending upon which side one favored. Due to that revolutionary history, the people of what was to be known as the "United States" had different concerns on their minds than United States citizens have today.

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<sup>104</sup> See CNN.Com, *National Security Takes Center Stage*, (Aug. 31, 2004), at <http://www.cnn.com/2004/ALLPOLITICS/08/31/Watson.monwrap/index.html> (last visited Jun. 16, 2005).

<sup>105</sup> *Id.*

Through the doctrine of “Separation of Powers” the Congress would attempt to spread power thinly enough amongst the executive, legislative, and judicial branches that no one branch, and still less no one person, would have the majority of the power in his or her hands. Not only would the branches of government necessarily be separate, but also checks would be implemented upon each branch by the others so as to regulate the power any one branch held. As James Madison stated in the Federalist Papers, “[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>106</sup> Quoting the supreme authority on the topic at the time, Montesquieu, Madison continues:

‘When the legislative and executive powers are united in the same person or body’ says he, ‘there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws, to *execute* them in a tyrannical manner.’ Again ‘Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.’<sup>107</sup>

Likewise, the Supreme Court has held in no uncertain terms that the executive branch is to be checked by the judicial and legislative branches. The authority the executive exercises must stem either from the Constitution directly or from legislative enactment giving the President that power he exercises, in spite of how “cumbersome, involved, and time consuming” the exercise of executive duties may be without the additional power he seeks.<sup>108</sup>

As Justice Black states:

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<sup>106</sup> ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY, THE FEDERALIST, Jacob E. Coke ed., Wesleyan University Press (1961).

Id. at pg. 235.

<sup>108</sup> Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States . . . .'<sup>109</sup>

Having thus established the President is subject to the Constitution, legislative and judicial branches and that his authority is far from absolute, this paper will now examine how in recent times, in particular in regards to the war on terrorism, Congress has allowed or mandated the executive branch to expanded its authority. Through this expansion of authority, the executive branch has slowly usurped (or been handed) the constitutional charges given the competing two branches of the federal government.

#### *B. Terrorism and Treason Statutes Comparison*

The United States has a common law system of government inherited from its English roots, while both Colombian and Peruvian governments have a civil law system inherited from their Spanish roots. Case law in the United States plays a much greater role than in Colombia and Peru. For that reason, the Colombian and Peruvian law laid out below may seem more sterile than that of the United States due to the lack of case law definitions and development occurring after the initial promulgation of the law. While there are, therefore, differences in statutory schemes and writing styles between the two systems, in the context of laws on terrorism and treason, the common law versus civil law differences are present but minimal and still lend themselves to some degree of comparison.

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<sup>109</sup> *Id.*

### *United States*

Under United States law, terrorism is broken down into two basic categories: international terrorism and domestic terrorism.<sup>110</sup> As stated above, the terrorist threat the United States faces is different in some respects, particularly within the last decade, to that in Colombia and Peru. The terrorist threats in Colombia and Peru are primarily internal, while the current primary threat in the United States is external.

There are, therefore, some important practical and legal differences between the approaches to fighting terrorism in the three countries. Legally, those terrorists fighting externally against the United States may have different rights than Timothy McVeigh had, for example. As a United States citizen, McVeigh had all of the rights guaranteed him by the Constitution. That is not the case, however, for those who aren't United States Citizens, are non-citizens outside of the territory of the United States (or unlawfully in the United States), or who don't have "sufficient connection" with the United States to be considered part of its community.<sup>111</sup> Therefore it would be lawful for government agents to act in (what would otherwise be) violation of the Constitution in relation to those alien terrorists. The military would not need a search warrant to search, for example, Osama Bin Laden's cave.<sup>112</sup>

These differences between the treatment of aliens and citizens may be significant in some cases, affecting the rights to which the defendant is entitled. A direct comparison of statutes and decrees of the elements of terrorism is not greatly affected by those differences as the legislation and executive action in response to terrorism, be it international or domestic, does not

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<sup>110</sup> 18 U.S.C. § 2331 (2002).

United States v. Verdugo-Urquidez, 494 U.S. 259, 270 (1990).

<sup>12</sup> See e.g. *Id.* At 273, 274.



differentiate between citizens or non-citizens. However, in other cases in which the procedural aspects of the response to terrorism are considered, below, those differences are important and will be discussed.

For an act to be labeled criminal “terrorism” in the United States it must satisfy the following requirements: 1) it must “involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State,”<sup>113</sup> and 2) it must “appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination; or kidnapping.”<sup>114</sup>

These provisions are written such that there is little discretion in whether an act is defined by the executive branch, specifically a prosecutor, as terrorism. The act must be violent or dangerous, a crime, and it must at least have the appearance of being committed to intimidate, influence, or affect the population or government. Additionally, the statute has been defined by subsequent case law to necessitate an element of specific intent in holding a member of an organization liable for acts committed by said terrorist organization.<sup>115</sup> Yes, there is some discretion inherently in the terms “violent,” and “dangerous to human life,” and perhaps more so in the term “appear.” Such discretion grants power to the executive branch in its prosecutions, but the discretion in this particular statute has not been held to be constitutionally overbroad, which would grant unnecessary discretion to the executive.

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<sup>13</sup> 18 U.S.C. § 2331 (2002).

<sup>114</sup> *Id.*

<sup>115</sup> *See Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (2002) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *National Organization for Women, Inc. v. Scheidler*, 267 F.3d 687, 703 (7th Cir. 2001), cert. granted, 122 S. Ct. 1604 and 122 S. Ct. 1605 (2002).

However, federal prosecutors have recently used another statute that does allow them more discretion in prosecuting terrorists or would-be terrorists.<sup>116</sup> The law prohibiting “[p]roviding material support to terrorists” states in part:

Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out [various terrorist acts] . . . or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.<sup>117</sup>

As originally written, this statute allowed the prosecution more discretion than other anti-terror statutes, as the definition of “material support” was written so broadly that, as a Georgetown law professor stated, “it would make it a crime for a Quaker to send a book on Ghandi's theory of nonviolence to the leader of a terrorist group” and that “[i]t essentially resurrects the guilt-by-association philosophy of the McCarthy era.”<sup>118</sup> Portions of the statute to include references to providing “training” and “personnel” or “expert advice or assistance” were held to be overly broad.<sup>119</sup> “The material support law is in most respects a sensible tool for achieving prevention, but it also has opened a window for a more direct form of prevention

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<sup>116</sup> See generally; E. Lichtblau, *1996 Statute Becomes the Justice Department's Antiterror Weapon of Choice*, N.Y. TIMES, Apr. 6, 2003, at B-15; Dan Eggen and Steve Fainaru, *For Prosecutors, 1996 Law Is Key Part of Anti-Terror Strategy; Some Courts Troubled by Broad Terms of Previously Seldom-Used Law*, WASHINGTON POST, Oct. 15, 2002, at A-2.

<sup>117</sup> 18 U.S.C. § 2339A (2005) (references to specific sections constituting “various terrorist acts” omitted).

<sup>118</sup> Eggen & Fainaru, *supra* note 116.

<sup>119</sup> See *Humanitarian Law Project v. Reno*, 9 F.Supp. 2d 1205 (C.D. Cal. 1988), *aff'd* 205 F.3d 1130 (9th Cir. 2000), *cert. denied* 532 U.S. 904 (2001); See also Robert M. Chesney, *Constitutional Law: Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique: Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, 101 Mich. L. Rev. 1408 (2003) (discussing *United States v. Goba*, 18 U.S.C. 2339B) (arguing that while the majority of the “guilt by association” statutes are not overly broad, the references to providing “personnel” results in a “status-based prohibition” versus a conduct-based prohibition, *id.* at 1433).

[in violation of the First Amendment], and this raises significant civil liberties concerns. That window is small for now, but it could open wider.”<sup>120</sup>

In 1994 Congress altered the definitions of “material support or resources,” now defined as:

[A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.<sup>121</sup>

But prosecutors have, both before and since the amendment, been successful in using the statute to convict terror related crime and the law has, in those cases, been held to be constitutional and not overly broad in relation to the legitimate reach of the statute.<sup>122</sup> And the fact prosecutors had been successful in prosecuting terrorism under the statute prior to the 1994 amendment to the statute is important. The amendment defining “material support and resources” which somewhat restricts prosecutors and narrows the scope of the statute, is subject to a sunset provision in 2006.<sup>123</sup> The congressional fix was a step in the right direction towards restricting executive and prosecutorial discretion in the real of terrorism, but that fix may prove to be temporary.

Because Colombia and (especially) Peru often use “treason” as the statutory vehicle to prosecute domestic terrorism, the United States statute is included here. The manner in which

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<sup>120</sup> Robert M. Chesney, *supra* note 119, at 1452.

<sup>121</sup> See 18 U.S.C. § 2339A (2005); See also 18 U.S.C. §§ 2339B-2339D (2005); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603 (a)(2) (2004).

<sup>122</sup> See *e.g.* United States v. Hammoud, 381 F.3d 316 (2004) (upholding Hammoud’s conviction under 18 U.S.C. § 2339B which prohibits providing “material support or resources to designated foreign terrorist organizations”); United States v. Goba, 240 F. Supp. 2d 242 (W.D.N.Y. 2003).

<sup>123</sup> Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603(g) (2004).

the United States treason statute is written, however, gives it a different contextual meaning and perhaps makes it less directly comparable to the definition of treasonous acts in Colombia and Peru.

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than \$10,000; and shall be incapable of holding any office under the United States.<sup>124</sup>

Mere treasonous thoughts are not sufficient to constitute a crime of treason. The statute requires an overt act thereof; “the evolution of a plot against the country into an actual project.”<sup>125</sup>

## ii. *Colombia*

As is the case with most civil law countries, Colombia’s law on terrorism, treason, and all things related thereto is perhaps less extensive than the equivalent law in the United States (especially when United States case law is thrown into the equation), though still plentiful.<sup>126</sup> There is one section of the code dealing specifically with the basic act of terrorism (as opposed to trafficking in weapons of mass destruction,<sup>127</sup> unlawful use of uniforms and insignias,<sup>128</sup> threats,<sup>129</sup> panic,<sup>130</sup> etc.), which states:

El que provoque o mantenga en estado de zozobra o terror a la población o a un sector de ella, mediante actos que pongan en peligro la vida, la integridad física o

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<sup>124</sup> 18 U.S.C. § 2381 (2002).

<sup>125</sup> *Dennis v. United States*, 341 U.S. 494 (1951).

<sup>126</sup> See generally Código Penal (Cód. Pen.) Título XII [Title XII] (Colombia).

<sup>127</sup> See Cód. Pen. art. 358 (Colombia).

<sup>128</sup> See Cód. Pen. art. 346 (Colombia).

<sup>129</sup> See Cód. Pen. art. 347 (Colombia).

<sup>130</sup> See Cód. Pen. art. 355 (Colombia).

la libertad de las personas o las edificaciones o medios de comunicación, transporte, procesamiento o conducción de fluidos o fuerzas motrices, valiéndose de medios capaces de causar estragos, incurrirá en prisión de diez (10) a quince (15) años . . . . [Whoever provokes or maintains a state of distress or terror to the population or a segment thereof, through acts which put in danger life, physical integrity, or liberty of the people, buildings, or means of communication, transportation, processing or conveyance of fluids or power facilities, will be imprisoned for ten (10) to fifteen (15) years . . . .]<sup>131</sup>

One element of the crime of terrorism in the United States that is not present in the crime in Colombia, is the requirement the act have the appearance of being committed to “intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government.”<sup>132</sup> Certainly the language that the perpetrator of terrorism must “provoke[] or maintain[] a state of distress or terror to the population or a segment thereof” may imply a requirement similar to that of an the requirement for an appearance of being committed to intimidate, influence, or affect in the United States. But the fact remains there is not, either on its face or in subsequent interpretive law, a requirement for specific intent.

Additionally, there is no requirement a criminal act be committed in the course of the act of terrorism. Thus, the executive branch would be able to prosecute an individual for otherwise lawful acts that have the result of creating a state of distress or terror within the population. Granted, the acts must be such that they *endanger* life, liberty, or property, but the law is written sufficiently broadly that it would not be difficult to prosecute, for example, harsh speech directed at requiring someone to government officials or at populations, as terrorism. Such otherwise

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<sup>131</sup> Cód. Pen. art. 343 (Colombia) (The punishments listed are in addition to the punishments levied for the individual criminal acts committed as part of the “terrorism”).

<sup>132</sup> 18 U.S.C. § 2331 (2002).

lawful speech may endanger life, liberty, or property by its inflammatory nature, regardless of the intent of the speaker.

The sections of the code dealing with treason are split into “Menoscabo de la integridad nacional [Lessening national integrity],”<sup>133</sup> “Hostilidad militar [Military hostility],”<sup>134</sup> “Traición diplomática [Diplomatic treason],”<sup>135</sup> “Instigación a la guerra [Inciting war],”<sup>136</sup> “Atentados contra hitos fronterizos [Attempts against border landmarks],”<sup>137</sup> “Actos contrarios a la defensa de la Nación [Acts contrary to the defense of the Nation],”<sup>138</sup> “Ultraje a emblemas o símbolos pátrios [Contempt against emblems and symbols of the country],”<sup>139</sup> and “Aceptación indebida de honores [Unlawful acceptance of honors].”<sup>140</sup>

Thus, as stated above, there is some difficulty in comparing the common law statutes of the United States with the civil law statutes of Colombia and Peru. However, though the crimes delineated may be more specific in the civil law code, the underlying elements are comparable. For example, the crime of “Threatening National Integrity” encompasses the basic elements of treason as defined under United States’ law. It states: “El que realice actos que tiendan a menoscabar la integridad territorial de Colombia, a someterla en todo o en parte al dominio extranjero, a afectar su naturaleza de Estado soberano, o a fraccionar la unidad nacional,

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<sup>133</sup> Cód. Pen. art. 455 (Colombia).

<sup>134</sup> Cód. Pen. art. 456 (Colombia).

<sup>135</sup> Cód. Pen. art. 457 (Colombia).

<sup>136</sup> Cód. Pen. art. 458 (Colombia).

<sup>137</sup> Cód. Pen. art. 459 (Colombia).

<sup>138</sup> Cód. Pen. art. 460 (Colombia).

<sup>139</sup> Cód. Pen. art. 461 (Colombia).

<sup>140</sup> Cód. Pen. art. 462 (Colombia).

incurrirá en prisión de veinte (20) a treinta (30) años. [Whoever commits acts which tend to lessen the territorial integrity of Colombia, to submit it in whole or in part to foreign dominance, to affect its nature as a sovereign state, or to break up national unity, shall be imprisoned for twenty (20) to thirty (30) years].”<sup>141</sup>

The “treason” definition in Colombia is both more specific and perhaps broader than that of the United States. While the United States definition has an international slant, the Colombian statute seems to prohibit both international and domestic treason. This gives prosecutors (and the executive branch) another avenue for pursuing “terrorists” who don’t fit the statutory definition thereof; they may not have created the necessary distress or terror or have acted in a manner which will endanger life, liberty or property but may have acted in such a way as to “break up national unity.”<sup>142</sup> Similar to United States law, however, Colombian treason does require an overt act.

### iii. *Peru*

Though similar to the legislation on terrorism and treason in Colombia, there are some subtle differences in the Peruvian statutes that may restrict the executive branch more than the Colombian legislation does. As argued below, however, the legislation itself may not be as important as how the legislation is employed (or ignored). The Peruvian statute on terrorism reads, in part, as follows:

El que provoca, crea, o mantiene un estado de zozobra, alarma o terror en la población o en un sector de ella, realizando actos contra la vida, el cuerpo, la salud, la libertad, la seguridad personal o la integridad física de las personas . . . empleando . . . métodos violentos, armamentos, materias o artefactos explosivos o cualquier otro medio capaz de causar estragos o grave perturbación de la tranquilidad pública o afectar las relaciones internacionales o la seguridad social o

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<sup>141</sup> Cód. Pen. art. 455 (Colombia).

<sup>142</sup> *Id.*

estatal, sera reprimido con pena privativa de la libertad no menor de diez años. [Whoever provokes, creates, or maintains a state of distress, alarm or terror in the population or in a segment thereof, carrying out acts against life, body, health, liberty, personal security or physical integrity of the people . . . employing . . . violent methods, arms, materials or explosive artifacts or whatever other method capable of causing ruin or grave disturbance of public tranquility or to affect international relations or social or state security, will be punished with deprivation of liberty for no less than twenty years.]<sup>143</sup>

Here one again sees that the definition does not require the same type of intent it does in the United States. The difference in this case is perhaps more subtle than the difference in the case of the Colombian legislation, however, because the statute does require the act create a “disturbance of public tranquility or [] affect international relations or social or state security.”<sup>144</sup> While this may seem to require intent similar to that in the United States statute, none is actually needed. The mere fact the act causes a “disturbance of public tranquility”<sup>145</sup> is sufficient.

Perhaps more interestingly, the terrorism statute as quoted above (Decreto Ley 25475) includes modifications enacted by President Fujimori himself (by presidential decree) to Article 319 of the original Código Penal [Penal Code] during the Fujigolpe.<sup>146</sup> The Peruvian Constitution in place at the time did grant the President certain emergency powers in cases of grave disturbances of the public peace, and did allow for the President to dissolve one side of the bicameral congress (La Cámara de Diputados [Chamber of Deputies]) in some situations in which there was a vote of no confidence by the Chamber of Deputies on three occasions (which did not apply in this case).<sup>147</sup> But there was no authority to dismiss the entire congress or to

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<sup>143</sup> Decreto Ley 25475, art. 2, (1992) (Peru).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *See* Código Penal, art. 319 (Peru).

<sup>147</sup> *See* Constitución Política del Perú de 1979 arts. 227, 228, 231(a).



decree law during its dismissal, as President Fujimori did. In fact, the constitution specifically forbade dissolution of the Chamber of Deputies during a state of emergency.<sup>148</sup>

During the Fujigolpe, in addition to changes to judicial procedures, President Fujimori doubled the minimum punishment for terrorist acts from ten years to twenty.<sup>149</sup> Years later, there were numerous protests to this increase (along with the other changes to the judicial process for terrorist proceedings and changes to the treason statute (discussed below)) as discussed at length in the case brought before the Constitutional Tribunal of Peru by “5,000 [Peruvian] citizens.”<sup>150</sup>

The Peruvian law on treason, which was used extensively to prosecute terrorists in the early 1990s, is actually just a prohibition against certain acts that would otherwise constitute terrorism under the statute thereon. The presidential treason decree prohibits the following:

Utilización de coches bomba o similares, artefactos explosivos, armas de Guerra o similares, que causen la muerte de personas o lesionen su integridad física o su salud mental o dañen la propiedad pública o privada, o cuando de cualquier otra manera se pueda generar grave peligro para la población. [The use of car or similar bombs, explosive artifacts, war or similar arms, which cause people death or injury to their physical integrity or mental health or damage public or private property, or when by any other means grave danger to the population is created.]<sup>151</sup>

This Presidential Decree, like the similar decree on terrorism, was promulgated by President Fujimori during the Fujigolpe.<sup>152</sup> The treason decree may seem innocuous on its face, but President Fujimori used it to take what would otherwise have been a civilian offense of

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<sup>148</sup> *Id.* at 229.

<sup>149</sup> *Id.*

<sup>150</sup> *See generally* Tribunal Constitucional, 01-2002-AI/TC (Peru).

<sup>151</sup> Decreto Ley 25659, art. 1(a), (1992) (Peru).

<sup>152</sup> *See* Wikipedia-Fujimori, *supra* note 20.

terrorism, prosecuted in civilian courts, and make such actions military offenses, prosecutable in military courts. Violations of the treason decree “serán de competencia del Fuero Privativo Militar, tanto en su investigación como en su juzgamiento [will be, both in the investigation and prosecution, under the jurisdiction of Military Courts].”<sup>153</sup> Thus the Peruvian treason decree is completely different from its Colombian and United States’ counterparts. It is really a procedural decree vice a criminal statute.

#### iv. *Comparison*

Initially it appears that the executive branch’s authority in the United States in the realm of terrorism is not as expansive as the executive branch’s authority in Colombia and Peru. Colombia has left more discretion in prosecuting terror to the executive branch than has the United States. Peru (most often the most extreme example in this paper) has “statutes” actually written by the executive branch. Additionally, through the use of the treason statute decreed by President Fujimori, the executive branch itself would prosecute terrorists through its military courts.

These laws give some indication as to the state of anti-terrorism law in the three countries and what led to that state, yet they do not necessarily paint an accurate picture of where the law, particularly in the United States, may be headed. As is the case with President Fujimori’s alterations to terrorism and treason law in Peru, it is often the procedure and not the substance of the statutes that is most telling. These, with other indications, discussed below, tend to show the United States is heading in the same direction (though admittedly, not to the same extent) as the extreme example of executive power, President Fujimori’s Peru.

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<sup>153</sup> Decreto Ley 25659, art. 4, (1992) (Peru).

### C. *Evidence Gathering and Investigation Procedures*

As stated above, this is a comparative analysis of United States, Colombian and Peruvian terrorism law. In Colombia and Peru during the Uribe and Fujimori there have not been (or were not) drastic changes made to the procedural search and seizure laws. In fact, in President Fujimori's decree on treason, he specifically stated the police should continue to abide by the already established law of searches in Peru.<sup>154</sup> President Fujimori did adopt other ways of dealing with searches and seizures which were well outside the law which are not directly comparable with any changes to search and seizure law in the United States to facilitate the war on terror. However, in an effort to compare terrorism law as a whole, it is necessary to include a few provisions of United States search and seizure law which are related to terrorism. Though not directly comparable to similar provisions in Colombia or Peru, they do evidence and are comparable to the expansion of executive power in those two countries, coinciding with their fights against terrorism.

#### i. *Sneak and Peek Searches*

As discussed above, the Patriot Act was passed in November of 2001 in reaction to the attacks of September 11<sup>th</sup> of that same year.<sup>155</sup> Though the act and its effects are broad and numerous, this paper will focus on only a few of those provisions.

Section 213 of the Patriot Act codified so-called "sneak and peek" or surreptitious searches, though such searches (discussed further below) had taken place in some jurisdictions before the codification. The act provides for an amendment to 18 U.S.C. § 3103a (2002), which amendment states:

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<sup>154</sup> Decreto Ley 25475, *supra* note 143 at art. 12.

<sup>155</sup> See generally H.R. 3162, 107<sup>th</sup> Cong. (2001).

With respect to the issuance of any warrant or court order under this section, or any other rule of law, to search for and seize any property or material that constitutes evidence of a criminal offense in violation of the laws of the United States, any notice required, or that may be required, to be given may be delayed if (1) the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result (as defined in section 2705); (2) the warrant prohibits the seizure of any tangible property, any wire or electronic communication (as defined in section 2510), or, except as expressly provided in chapter 121, any stored wire or electronic information, except where the court finds reasonable necessity for the seizure; and (3) the warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.<sup>156</sup>

The Fourth Amendment to the United States Constitution includes a prohibition against “unreasonable searches and seizures.”<sup>157</sup> Surreptitious or “sneak and peek” searches are not expressly prohibited by the Constitution, but as with other searches conducted by the government, pursuant to the Fourth Amendment they must be reasonable in order to be constitutional. Prior to the enactment of the Patriot Act, federal courts allowed surreptitious searches to take place, but in order to ensure the searches were reasonable, they attempted to apply judicially derived restrictions to the situations in which they were allowed.<sup>158</sup> This was because “[w]hile it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy.”<sup>159</sup> Those restrictions were produced on a case-by-case basis and were not uniformly applied amongst the federal circuits. Search warrant notice law was “a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction

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<sup>156</sup> H.R. 3162, 107<sup>th</sup> Cong. § 213 (201).

<sup>157</sup> U.S. Const. amend. IV.

<sup>158</sup> See generally Robert M. Duncan, Jr., *Celebrating Student Scholarship: Surreptitious Search Warrants and the USA Patriot Act: “Thinking Outside the Box but Within the Constitution,” or a Violation of Fourth Amendment Protections?*, 7 N.Y. City L. Rev. 1 (2004).

<sup>159</sup> *United States v. Freitas*, 800 F.2d 1451, 1454 (9th Cir. 1986).

across the country.”<sup>160</sup> Because this common law was developed before the enactment of the Patriot Act, it will not be binding on the interpretation of the sneak and peek provisions in the Patriot Act. However, courts interpreting the sneak and peek provisions of the Patriot Act may be guided by these previous decisions, as was Congress in drafting the provisions.<sup>161</sup>

In a Ninth Circuit case, *United States v. Freitas* (hereinafter “Freitas”),<sup>162</sup> the court held evidence collected as a result of a surreptitious search based upon probable cause was admissible against the defendant, but only because the agents conducting the search relied upon the warrant in good faith.<sup>163</sup> In *Freitas*, agents conducted a search of the defendant’s property with a warrant which stated neither the property to be searched nor that notice of the search had to be given the defendant (either before or after conducting the search). The court stated in spite of the lack of prohibition against surreptitious searches in the Fourth Amendment, “in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity.”<sup>164</sup>

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<sup>160</sup> Beryl A. Howell, *The Future of Internet Surveillance Law: A Symposium to Discuss Internet Surveillance, Privacy & the USA Patriot Act: Surveillance Law: Reshaping the Framework: Seven Weeks: The Making Of The USA Patriot Act*, 72 Geo. Wash. L. Rev. 1145, 1184 (2004) (citing Attorney General Ashcroft’s Draft Anti-Terrorism Package (Anti-Terrorism Act of 2001) Section-by-Section Analysis, at § 352, available at <http://leahy.senate.gov/press/200109/092001.html> (last visited June 9, 2005)).

<sup>161</sup> *E.g. Duncan*, *supra* note 158 at 26.

<sup>162</sup> *United States v. Freitas*, *supra* note 159.

<sup>163</sup> *Id.* at 1457.

<sup>164</sup> *Id.* at 1456; *see also United States v. Heal*, 1992 U.S. App. LEXIS 20213 (9th Cir. 1992) (upholding a surreptitious search warrant which itemized tangible property to be seized and required giving the defendant notice of the search within seven days).

In the Second Circuit case of *United States v. Villegas* (hereinafter “*Villegas*”),<sup>165</sup> agents conducted a surreptitious search of a cocaine factory operated by the defendant and others. The affidavit supporting the search warrant stated that the agents wished to search the premises upon which the cocaine factory was located “any time in the day or night” but that no tangible evidence was to be seized.<sup>166</sup> “The agents also requested permission to postpone giving Villegas notice of the search for seven days, or for a longer period if the period were extended by the court.”<sup>167</sup> The court upheld the surreptitious search warrant in spite of the search for “intangibles” and the lack of notice requirements in the warrant.

With respect to the “seizure” of intangible items (through the taking of photographs, video, etc.) the court stated, “it is clear that both [Rule 41] and the Fourth Amendment extend to searches for and seizures of intangibles as well as tangibles.”<sup>168</sup> With regards to the surreptitious nature of the search, the court stated, “[w]hen nondisclosure of the authorized search is essential to its success, neither Rule 41 nor the Fourth Amendment prohibits covert entry.”<sup>169</sup>

However, despite the holding the Fourth Amendment and Rule 41 did not prohibit the surreptitious searches, the court realized the potential for abuse and the need for “safeguard[s] to minimize the possibility that the officers will exceed the bounds of propriety without detection.”<sup>170</sup> The court then went on to establish two safeguards for surreptitious searches.

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<sup>165</sup> *United States v. Villegas*, 899 F.2d 1324 (2d Cir. 1990).

<sup>166</sup> *Id.* at 1330.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 1334.

<sup>169</sup> *Id.* at 1336.

*Id.*

“First, the court should not allow the officers to dispense with advance or contemporaneous notice of the search unless they have made a showing of reasonable necessity for the delay.”<sup>171</sup>

Second, if a delay in notice is to be allowed, the court should nonetheless require the officers to give the appropriate person notice of the search within a reasonable time after the covert entry. What constitutes a reasonable time will depend on the circumstances of each individual case. We would, however, agree with the *Freitas* court that as an initial matter, the issuing court should not authorize a notice delay of longer than seven days. For good cause, the issuing court may thereafter extend the period of delay. Such extensions should not be granted solely on the basis of the grounds presented for the first delay; rather, the applicant should be required to make a fresh showing of the need for further delay.<sup>172</sup>

Later, in the case of *United States v. Pangburn*,<sup>173</sup> the Second Circuit further explained its ruling in *Villegas*. The court held *Villegas*, unlike *Freitas*, was not a ruling that notice (or an exception to the notice requirement) was required by the Fourth Amendment, but only by Rule

And evidence collected in violation of Rule 41 would only be excluded if “(1) there was ‘prejudice’ in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule.”<sup>175</sup>

Taken together, the two circuits realized the potential for abuse when using surreptitious searches and the need for checks upon that potential. The Ninth Circuit held the Constitution itself mandated notice of the search to the defendant within a reasonable period, generally seven

The Second Circuit agreed in principle with the need for notice to the defendant within

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Id. at 1337

<sup>172</sup> Id. (citations omitted)

<sup>73</sup> *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993).

<sup>174</sup> Id. at 454, 455; see also *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000) (holding similarly that notice requirements were regulated by Rule 41 and were not required by the Fourth Amendment).

<sup>175</sup> Id. at 455.

seven days and added the need for agents to show “reasonable necessity” for the delay. Unlike the Ninth Circuit, however, the Second Circuit based those precepts on the requirements of Rule 41 and not on the Fourth Amendment.

This difference is important because six months after passing the Patriot Act, Congress amended Rule 41 by adding the following language: “Scope and Definitions: This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.”<sup>176</sup> Therefore, if there is any conflict now between the provisions of the Patriot Act and Rule 41, the Patriot Act wins. So if the view of the Second Circuit which was established prior to the enactment of the Patriot Act is followed, which holds that the notice requirements are based upon Rule 41 and not on the Fourth Amendment, there would no longer be a notice requirement for surreptitious searches.

But in addition to the issues with surreptitious searches dealt with by courts prior to the enactment of the Patriot Act, there are additional problems with the codification of surreptitious searches. There is no definition of either “reasonable cause”<sup>177</sup> or “good cause”<sup>178</sup> in the statute. Ostensibly, courts may follow the reasoning in *Villegas* where the need for secret entry into the premises due to the difficulty in otherwise observing the unlawful occurrences on the property was sufficient to justify the surreptitious search, and new reasons for the requests for continued delays were forthcoming.<sup>179</sup> But again, there is no mandate the courts use the *Villegas* decision as a backdrop for litigation involving the Patriot Act provisions.

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<sup>176</sup> Fed. R. Crim. P. 41(a)(1).

3162, 107<sup>th</sup> Cong. § 213 (201).

<sup>178</sup> *Id.*

<sup>179</sup> *United States v. Villegas*, *supra* note 165 at 1338.



Additionally, the statute states immediate notification must be given unless the court finds providing that notification “*may* have an adverse result.”<sup>180</sup> In 18 U.S.C. § 2705 (2002), an “adverse result” is defined as “(A) endangering the life or physical safety of an individual; (B) flight from prosecution; (C) destruction of or tampering with evidence; (D) intimidation of potential witnesses, or (E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.”<sup>181</sup> “The statutory definition of adverse result is so all-encompassing that it is difficult to imagine many criminal investigations where at least one form of such a result is not going to be arguably applicable.”<sup>182</sup>

Neither are there definitions for “reasonable necessity”<sup>183</sup> in granting warrants for seizing tangible property or for “reasonable period”<sup>184</sup> for giving the defendant notice. The Second Circuit had held previously that searches that did not include seizure of evidence “are less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property,”<sup>185</sup> but with such a low threshold for being allowed to seize property rather than merely view it, the alleged restriction means little.

Again, courts will *probably* use the Freitas and Villegas decisions to determine what a “reasonable period” is, but Congress could have assured that would happen by defining those provisions themselves in accordance with the logically developed common law standards. In fact some members of Congress, Senator Leahy in particular, had proposed that the delayed

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<sup>180</sup> H.R. 3162, 107<sup>th</sup> Cong. § 213 (201) (emphasis added).

<sup>181</sup> 18 U.S.C. § 2705 (2002).

<sup>182</sup> Donald E. Wilkes, Jr., *Sneak and Peek Search Warrants and the USA Patriot Act*, The Georgia Defender (September 2002) at 1, available at [http://www.law.uga.edu/academics/profiles/dwilkes\\_more/37patriot.html](http://www.law.uga.edu/academics/profiles/dwilkes_more/37patriot.html) (last updated Jun. 30, 2003).

<sup>183</sup> H.R. 3162, 107<sup>th</sup> Cong. § 213 (201).

<sup>184</sup> *Id.*

<sup>185</sup> *United States v. Villegas*, *supra* note 165 at 1337.

notice provisions adopted by the Second and Ninth Circuits be included specifically in section 213 of the Patriot Act, or (when the seven-day provision was not included) that courts “be guided by the teachings of the Second and Ninth Circuits that, in the ordinary case, a reasonable time is no more than seven days.”<sup>186</sup> There’s no guarantee that will occur now.

These lapses in definitions and the whole idea of surreptitious searches have attracted criticism from civil rights organizations. Appropriately, the American Civil Liberties Union has noted

The notice requirement enables the person whose property is to be searched to assert her Fourth Amendment rights. For example, a person with notice might be able to point out irregularities in the warrant, such as the fact that the police are at the wrong address, or that because the warrant is limited to a search for a stolen car, the police have no authority to be looking in dresser drawers.<sup>187</sup>

The stated risk of the potential for abuse due to the absence of the individual whose property is being searched and her inability to challenge concurrently the search, is shared by others as well.<sup>188</sup> Those whose property is searched will never know (and thus never be able to challenge) whether the warrant requirements as to what was searched and when it was searched, were actually followed.

On the other hand, there are those who believe the surreptitious search provisions of the Patriot Act are merely the natural continuation of common search and seizure law and that the codification of those procedures will do nothing to threaten civil liberties. Paul Rosenzweig of the “Heritage Foundation” states:

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<sup>186</sup> 147 Cong. Rec. S11,002-03 (daily ed. Oct. 25, 2001).

<sup>187</sup> American Civil Liberties Union, *How the Anti-Terrorism Bill Expands Law Enforcement “Sneak and Peek” Warrants* (Oct. 23, 2001), at <http://www.aclu.org/NationalSecurity.cfm?ID=9151&c=111> (last visited Jun. 7, 2005).

<sup>188</sup> See Laurie Thomas Lee, *The USA Patriot Act and Telecommunications: Privacy Under Attack*, 29 Rutgers Computer and Tech. L.J. 371, 385 (2003).

We've been doing [surreptitious searches] for a long time and there hasn't been a rampant outbreak of abuse in the last 50 years, and I don't think the codification of it in the statute in 2001 is going to all of a sudden produce abuse where it had not been there before.<sup>189</sup>

This line of reasoning, however, presupposes law enforcement conduct the surreptitious searches in strict accordance with the requirements of the warrant (broad as those requirements may be). But, as stated above, one must rely on the government agents to do so because the whole idea of surreptitious searches is that no one else is watching when the search is conducted. One would like to believe that the government (in this case the executive branch) would not overstep its authority, but the history upon which constitutional checks and balances was based, leads one to believe otherwise. And, as stated above, those checks are too important to the longevity of our democracy to brush aside.

As discussed above, the Patriot Act contains within it various amendments to other statutes used to target terrorist activities in the United States. Other examples of such amendments are those affecting the Foreign Intelligence Surveillance Act.

## ii. *Foreign Intelligence Surveillance Act*

In 1978, the United States Congress passed the Foreign Intelligence Surveillance Act ("FISA").<sup>190</sup> Congress passed the law in partial response to President Nixon's surveillance of United States Citizens, to include the Democratic Party "under the guise of national security."<sup>191</sup>

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<sup>189</sup> *Information and the Law: Interview with Paul Rosenzweig, The Heritage Foundation*, 10 Geo. Public Pol'y Rev. 153, 157 (2004); See also 147 Cong. Rec. S10990, S11023 (daily ed. Oct. 25, 2001) (statement of Sen. Hatch) (stating "the bill simply codifies and clarifies the practice making certain that only a federal court, not an agent or prosecutor, can authorize such a warrant.").

<sup>190</sup> 50 U.S.C. §§ 1801-1836 (2002).

<sup>191</sup> Michael P. O'Connor & Celia Rumann, *Emergency and Anti-Terrorist Power: Going, Going, Gone: Sealing the Fate of the Fourth Amendment*, 26 Fordham Int'l L. J. 1234, 1239 (2003) (citing S. Rep. 95-701, 709; David Johnston, *Administration Begins to Rewrite Decades-Old Spying Restrictions*, N.Y. TIMES, Nov. 30, 2002, at A1); See also Steven A. Osher, *Privacy, Computers, and the Patriot Act: The Fourth Amendment Isn't Dead, but No One Will Insure It*, 54 Fla. L. Rev. 521, 532 (2002).

The statute created a separate process from that governing criminal investigations, for obtaining surveillance authorization to minimize the potential for a reoccurrence of President Nixon's tactics and/or similar surveillance of United States Citizens.<sup>192</sup>

Government searches may only be carried out under the Fourth Amendment to the United States Constitution if there is probable cause to believe the target of the search is involved in criminal activity.<sup>193</sup> Under FISA, "the President, through the Attorney General, may authorize electronic surveillance without a court order"<sup>194</sup> with a finding the target is a foreign power or agent thereof<sup>195</sup> (defined broadly enough that United States citizens could be included in the definition<sup>196</sup>, but there is no requirement the target be engaged in criminal activity. The search or surveillance conducted under FISA is subject to a lower authorization threshold because it is not conducted for criminal purposes.

Through FISA, Congress attempted to limit the propensity of the Executive Branch to engage in abusive or politically motivated surveillance. FISA was Congress's attempt to balance the "competing demands of the President's constitutional powers to gather intelligence deemed necessary to the security of the Nation, and the requirements of the Fourth Amendment."<sup>197</sup>

The Patriot Act amended portions of FISA.<sup>198</sup> *Inter alia*, the requirement the purpose of the surveillance be to gain foreign intelligence information was amended to require that such

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<sup>192</sup> See *United States v. U.S. District Court*, 407 U.S. 297 (1972) (recommending the creation of separate methods of obtaining surveillance authorization in domestic security cases).

<sup>193</sup> U.S. Const. amend. IV.

<sup>194</sup> 50 U.S.C. § 1802(a)(1)(A) (2002).

<sup>195</sup> 50 U.S.C. §§ 1805(a)(3)(A) (2002).

<sup>196</sup> 50 U.S.C. § 1801(a)(2, 3) (2002).

<sup>197</sup> O'Connor & Rumann, *supra* note 191 (citing H.R. Rep. No. 95-1283, at 15).

<sup>198</sup> See generally H.R. 3162, 107<sup>th</sup> Cong. (2001).

surveillance only be a “significant purpose.”<sup>199</sup>

This minor change of language has had a dramatic impact on [FISA’s] use. Now, for the first time in history, the government can conduct surveillance to gather evidence for use in a criminal case, so long as it presents a non-reviewable assertion that it also has a significant interest in the target for foreign intelligence purposes.<sup>200</sup>

In 2002 the Foreign Intelligence Surveillance Court of Review (“FISCR”)<sup>201</sup> issued an opinion (its first) discussing the Patriot Act amendment and the “significant purpose” requirements.<sup>202</sup> In that opinion the court reviewed whether Congress had intended, through the Patriot Act amendment, to raze the wall between criminal investigations and intelligence surveillance (which intermingling would taint the validity of evidence of criminal activity collected outside the normal warrant process of the Fourth Amendment).<sup>203</sup> The court held that not only did Congress intend to bring down that wall, but that such a wall had never been mandated under FISA.<sup>204</sup> The chain of the FISCR’s “logic” in the case runs as follows:

There are certain rules mandated by the Fourth Amendment that govern surveillance in criminal matters. These rules do not apply to surveillance conducted for foreign intelligence purposes. By definition, foreign intelligence surveillance will frequently result in gathering information related to certain criminal activities. Congress did not intend for investigators to stop pursuing evidence of crimes uncovered during foreign intelligence surveillance. Therefore, the FISCR concludes, criminal investigations may be the purpose behind

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<sup>199</sup> H.R. 3162, 107<sup>th</sup> Cong. § 218 (2001).

<sup>200</sup> O’Connor & Rumann, *supra* note 191, at 1242.

<sup>201</sup> The FISCR is established to review decisions of the Foreign Intelligence Surveillance Court (“FISC”). The FISC reviews applications for surveillance submitted pursuant to FISA. The applications are submitted *ex parte* and thus are only able to be appealed to the FISCR by the government. 50 U.S.C. § 1803(b) (2004).

<sup>202</sup> *In re Sealed Case*, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002). The fact the case was the first of its kind also highlights the rarity of a denial of a governmental request for surveillance under FISA.

<sup>203</sup> See O’Connor & Rumann, *supra* note 191, at 1243.

<sup>204</sup> *Id.*

surveillance conducted without adhering to the rules mandated by the Fourth Amendment.<sup>205</sup>

But much of that reasoning seems to be in conflict with prior Supreme Court rulings on Fourth Amendment law's applicability to intelligence surveillance and has been severely criticized by numerous articles.<sup>206</sup>

Other organizations, such as the American Civil Liberties Union, contended that Congress did not intend to remove the "wall," but simply to clarify that foreign intelligence gathering need not be the *exclusive* purpose of FISA surveillance. In the alternative, civil liberties advocates argued that even if Congress had intended to take down the "wall," such legislation would violate the Fourth Amendment by allowing federal prosecutors to use the less stringent FISA standards for initiating electronic surveillance. The relaxed standards, they argued, would permit federal prosecutors to circumvent normal Fourth Amendment warrant requirements.<sup>207</sup>

And while true that Congress may not have intended for criminal investigations to halt once evidence of criminal conduct was uncovered during an intelligence gathering surveillance operation, if that evidence is to be used in a criminal prosecution against the target of the surveillance it must have been collected as part of the intelligence gathering process (vice a related criminal investigation) or the processes used to gain that evidence must be conducted in accordance with the requirements of the Fourth Amendment.

The simple fact of the matter is that surveillance either complies with the probable cause and warrant requirements of the Fourth Amendment, or meets one of the exceptions permitting surveillance in their absence. The only potential exception routinely available for searches conducted pursuant to FISA, is when foreign intelligence is the purpose of the surveillance. The Keith decision<sup>208</sup> refers to this

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<sup>205</sup> Id. at 1256, 1257.

<sup>206</sup> See O'Connor & Rumann, *supra* note 191.

<sup>207</sup> Grayson A. Hoffman, *Litigating Terrorism: The New FISA Regime, the Wall, and the Fourth Amendment*, 40 Am. Crim. L. Rev. 1655 (2003).

<sup>208</sup> *United States v. United States District Court*, 407 U.S. 297 (1972).

requirement and the subsequent Circuit and District Court decisions spell it out carefully.<sup>209</sup>

Though the FISCRC apparently believes otherwise, if the impetus and constitutional justification for FISA was to create separate procedures for collecting intelligence vice collecting evidence for criminal prosecutions, amending “purpose” to “significant purpose” eradicates the basis for that argument. The executive branch is thereby allowed to bypass the Fourth Amendment of the Constitution if a “significant” portion<sup>210</sup> of the investigation involves intelligence gathering or purported intelligence gathering, while another significant portion may involve a criminal investigation. The potential for executive branch abuse is obvious.

This new language raises the concern that there is now more room for abuse by law enforcement. More specifically, based on this new requirement, law enforcement may now begin to conduct surveillance under a more easily acquired FISA warrant on a greater number of individuals, who may or may not be a foreign agent or a threat to national security. The new requirement would allow information obtained in such a situation to be admitted as evidence more frequently. The potential for abuse is enormous: as occurred during the 1960's and 1970's, intelligence surveillance could be utilized against ordinary U.S. citizens.<sup>211</sup>

The Patriot Act and its effects on individual rights (even those of suspected terrorists) disrupt the delicate system of checks and balances promulgated by the Constitution and which are necessary for the proper maintenance of our democratic system. Yes, the act makes it easier

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<sup>209</sup> O'Connor & Rumann, *supra* note 191, at 1260 (citing *United States v. Troung*, 629 F.2d 908 (4th Cir. 1980); *United States v. Megahey*, 533 F. Supp. 1180, 1189 (E.D.N.Y. 1982); *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984)).

<sup>210</sup> In *In re Sealed case*, *supra* note 202, at 735, the FISCRC states “[s]o long as the government entertains a realistic option of dealing with the agent other than through criminal prosecution, it satisfies the significant purpose test.” This further alters the original FISA statute by reducing the meaning of the amendment adjective “significant” to “a mere possibility.” *But see The USA Patriot Act in Practice: Shedding Light on the FISA Process: Hearings Before Senate Committee on the Judiciary*, 107<sup>th</sup> Cong. (Sept. 10, 2002), wherein Senator Specter states, “the word ‘significant’ was added to make it a little easier for law enforcement to have access to FISA material, but not to make law enforcement the primary purpose.”

<sup>211</sup> Thomas P. Ludwig, *The Erosion of Online Privacy in the Recent Tide of Terrorism*, 8 Comp. L. Rev. & Tech. J. 131, 165 (2003). *See also* Peter P. Swire, *The Future of Internet Surveillance Law: A Symposium to Discuss Internet Surveillance, Privacy & the USA Patriot Act: Surveillance Law: Reshaping the Framework: The System of Foreign Intelligence Surveillance Law*, 72 Geo. Wash. L. Rev. 1306, 1362, 1363 (2004).

to find terrorists. But does that advantage lead us closer to a political system more like the Colombian and Peruvian systems? Does that advantage come at the price of a portion of our democracy?

*D. Prosecuting and/or Deporting Alleged Terrorists*

*i. Military Commissions and Alien Terrorist Removal Courts*

In a move somewhat similar to that of President Fujimori, on November 13, 2001 President Bush issued a military order stating that all terrorists who were not United States citizens would be tried not in United States federal courts, that is, in civilian courts, but would be tried by military commissions.<sup>212</sup> United States residents or others with substantial connection to the United States would, according to the order, be subject to being tried by military commission as well.<sup>213</sup> Thus, instead of trying certain suspected terrorists in the judicial branch of the federal government, they would be tried by the executive branch.

In a similar situation in the case of *Ex Parte Quirin*, President Roosevelt sought to try eight German soldiers by military commission.<sup>214</sup> These German soldiers had entered the United States with the purpose of committing acts of sabotage, espionage, hostile or warlike acts, or violations of the law of war. The Supreme Court held:

The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation

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<sup>212</sup> Military Order, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 13, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html> (last visited May 20, 2005) [hereinafter *Military Order*].

<sup>213</sup> See generally Peter Raven-Hansen, *Detaining Combatants by Law or by Order? The Rule of Lawmaking in the War on Terrorists*, 64 La. L. Rev. 831 (2004).

<sup>214</sup> *Ex parte Quirin*, 317 U.S. 1 (1942).



of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.<sup>215</sup>

There has been additional support for such military orders recently in light of President Bush's order, detainment of Hamdi and Padilla, etc.<sup>216</sup> But regardless of the lawfulness of military commissions in general, there are still issues with the military order which establishes the use of military commissions in the current case.

In a conventional war setting where the criminal prosecutions of enemy soldiers take place overseas in the conflict zone, prosecution by military commission or court-martial is more understandable as a matter of convenience. Indeed, pursuant to the Uniform Code of Military Justice, which allows for the use of military tribunals to prosecute enemy combatants, the commissions may only try individuals for violations specified by statute to be tried by the commissions or violations of the "law of war."<sup>217</sup> No statute has been passed in this case to specify which crimes could be tried by military commission, so the commission must try violations of the law of war. The military order establishing the commissions, however, gives the commission jurisdiction over situations in which:

- (1) there is reason to believe that such individual, at the relevant times, (i) is or was a member of the organization known as al Qaida' (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) . . . of this order, and (2) it is in the interest of the United States that such individual be subject to this order.<sup>218</sup>

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<sup>215</sup> *Id.* at 26.

<sup>216</sup> See e.g. Curtis A. Bradley and Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 *Harvard L. Rev.* 2047 (2005).

<sup>217</sup> U.C.M.J. art. 21, 10 U.S.C. § 821 (2004).

<sup>218</sup> Military Order, *supra* note 212, at § 2(a)(1).

One may reasonably conclude the attacks of September 11, 2001, were acts of war, though there is some argument on the point. “Given the degree of violence in these attacks and the nature and scope of the organization necessary to carry them out, it is much more difficult to argue they are not acts of war than to argue that they are.”<sup>219</sup> Additionally, the fact Al Qaida had been involved in previous attacks against the United States, both its military and its civilians, adds credibility to the argument the attacks were acts of war,<sup>220</sup> and “[i]t would be anomalous to argue that, by operating so far outside the norms and principles of international law, the perpetrators of the attacks are beyond the application of the law of war.”<sup>221</sup>

But while the actual attacks of September 11, 2001 may be acts of war and violations of war (due to the direct attack of civilians)<sup>222</sup> it is more doubtful (or at least unclear) that mere membership in al Qaida or harboring members of al Qaida would constitute a violation of the law of war and therefore be subject to the jurisdiction of the military commissions.<sup>223</sup> And if such acts or membership is not a violation of the law of war, then the military commissions cannot have jurisdiction over the alleged offense, in spite of the language of the military order.

Furthermore, it may not be best to prosecute an alleged terrorist by a military commission, for more practical reasons. Even if a case is brought constitutionally and otherwise

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<sup>219</sup> *American Bar Association Task Force on Terrorism and the Law Report and Recommendations on Military Commissions* (Jan. 4, 2002) (hereinafter ABA Task Force), available at <http://www.abanet.org/leadership/military.pdf> (last visited Jun. 17, 2005); Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 *Green Bag* 2d 249 (2002); But see Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 *Mich. J. Int'l L.* 1 (2001) (arguing that acts of terrorism are probably not war crimes); Noah Feldman, *Choices of Law, Choices of War*, 25 *Harv. J. L. & Pub. Pol'y* 457 (arguing that whether terrorist attacks constitute violations of the law of war is still unsettled).

<sup>220</sup> ABA Task Force, *supra* note 219, at footnote 14.

<sup>221</sup> *Id.* at 8.

<sup>222</sup> *Convention Relative to the Protection of Civilian Persons in Time of War*, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287.

<sup>223</sup> ABA Task Force, *supra* note 219, at 9.

lawfully before a military commission for prosecution, it may be best in a number of these cases to try them in civilian courts, in spite of that legality.

Violations of U.S. criminal statutes are not, as such, subject to the jurisdiction of military commissions. This may restrict the number, and utility, of military commissions. It could complicate choice of forum questions in cases in which a person may be liable for violations of U.S. laws as well as for war crimes.<sup>224</sup>

But beyond the legal concerns and mere practical concerns, the use of military commissions carries with it a stigma in both the national and international communities, and perhaps rightfully so with international examples such as the military commissions used by President Fujimori. “The major disadvantage [to military commissions] is the perception (at least), at home and abroad that military commissions lack adequate safeguards to ensure a fair trial.”<sup>225</sup> In light of recent allegations of abuse at the facilities at Guantanamo Bay and Abu Gharaib, and the failed post-invasion search for prohibited weapons in Iraq, the United States could use a boost in its international reputation. Avoidance of the use of military commissions, when possible, could be a step in the right direction.

Yet, as was the case in Peru, there are legitimate concerns with the prosecution of war crimes committed by terrorists in civilian courts. Security is an obvious issue, but so is the protection of classified evidence.<sup>226</sup> But “[t]here is no question that the Government cannot invoke national security concerns as a means of depriving [the defendant] of a fair trial.”<sup>227</sup> Hence, in some cases the use of civilian courts may not be a viable option because the government’s need to protect national security would inevitably conflict with the accused ability

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<sup>224</sup> Id. at 8.

<sup>225</sup> Id. at 16.

<sup>226</sup> See *United States v. Moussaoui*, 382 F.3d 453 (2004).

<sup>227</sup> Id. at footnote 18.

to be given a fair trial. “While mechanisms exist to protect evidence of a classified nature from exposure, these may not suffice to protect the information from the defendants and, through them, others who may use such information to the harm of the U.S. and its citizens.”<sup>228</sup> So the government would, in civilian courts, be forced to choose between guarding national security and exposing that security to risk in the name of gaining a conviction. In those instances, military commissions may not be the best, but the only option available. Whenever possible, however, for the reasons cited above, resorting to use of the military commissions for prosecution should indeed be the last resort when the use of civilian courts would seriously endanger national security.

Finally, by granting jurisdiction over terrorist violations of the laws of war (and, as discussed above, perhaps over non-violations of war) the executive branch is able to avoid the check from the judicial branch on its authority and to isolate itself from responsibility for any abuses committed either in law or process against suspected terrorists through such in-house prosecutions. In fact, in the President’s Order establishing the commissions, it states:

With respect to any individual subject to this order, (1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding brought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.<sup>229</sup>

While this does not obviate the ability to apply for a Writ of Habeas Corpus in most instances (at least for those within the territorial jurisdiction of the United States or those who have committed war crimes in the United States),<sup>230</sup> it does protect the executive branch from the

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<sup>228</sup> ABA Task Force, *supra* note 219, at 14 (citing 18 U.S.C. App. §§ 1-16).

<sup>229</sup> Military Order, *supra* note 212, at § 7(b).

<sup>230</sup> ABA Task Force, *supra* note 219, at 11

overseeing eyes of the judiciary to a large degree. Due to that aggrandizement of executive power, in light of the potential legal and practical problems, the inherent stigma and the lack of judicial review of the military commissions, their use should be confined to those cases in which security is the overriding concern.<sup>231</sup>

*ii. The Use of Classified Information in Immigration Proceedings*

The Immigration and Naturalization Service (INS) has been using classified information against aliens since at least 1950.<sup>232</sup> Between 1992 and 1998, the INS used classified information against aliens fifty times.<sup>233</sup> In one particularly egregious case, an Egyptian national, Nasser Ahmed, was held in confinement for three and one half years based upon classified information that had not been disclosed to him.<sup>234</sup> Instead, the INS provided him with a summary of the classified information which informed Ahmed his detention “concern[ed] his alleged association with an organization that ha[d] engaged in terrorism.”<sup>235</sup> After the three and one half years of detention an immigration judge who held the classified information to be unreliable and largely available through unclassified sources released him.<sup>236</sup>

In another case, the INS attempted to exclude a lawful permanent resident from returning to the United States after traveling abroad, with the use of classified information.<sup>237</sup> In a quote

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<sup>231</sup> *Id.* at 16.

<sup>232</sup> H.R. Rep. No. 106-981, § 3 (2000).

<sup>233</sup> *Id.* at § III.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Rafeedi v. INS*, 880 F.2d 506 (D.C. Cir. 1989).

that may sum up most of the critiques of CIPA and the INS' policies on the use of classified information against suspected terrorist-aliens, the court stated,

Rafeedie—like Joseph K. in Kafka's 'The Trial'—can prevail . . . only if he can rebut the undisclosed evidence against him, i.e. provide that he is not a terrorist regardless of what might be implied by the government's confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.<sup>238</sup>

In 1996 Congress passed legislation creating the as yet unused Alien Terrorist Removal Court (ATRC)<sup>239</sup> which court allows the use of classified information against a suspected alien terrorist in a removal hearing. Notably, for the first time it specifically allowed the use of classified information against lawful permanent residents.<sup>240</sup> The attorney general submits the classified information to be used against the suspect *ex parte* and *in camera*.<sup>241</sup> The attorney general must then provide an unclassified version of the evidence to the court which evidence could then be seen by the suspect and his counsel.<sup>242</sup> The statute does mandate the government provide the defendant with a summary of the classified information, which summary must be approved by the court as being sufficiently informative to provide the defendant with the ability to prepare a proper defense.<sup>243</sup> That provision of a summary of the classified evidence may be waived, however, if the "continued presence of the alien in the United States [and provision to

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<sup>238</sup> Id.

<sup>239</sup> 8 U.S.C. §§ 1531-1537 (2004).

<sup>240</sup> Id.; See also David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 Sup. Ct. Rev. 47, 134 (2001).

<sup>241</sup> 8 U.S.C. § 1534(e)(3) (2004)

<sup>2</sup> Id.

<sup>3</sup> Id.

him of the summary of classified evidence] would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person.”<sup>244</sup>

While the provisions in the legislation mentioned above that the court must assure the substituted evidence that replaces the classified evidence allow the defendant the ability to prepare his defense, the court, not the defendant, makes that decision. The defendant obviously never has the opportunity to view the documents or hear the testimony the court views and hears in making that decision. Hence, in essence, the court decides what type of defense the accused should or could make in the case based upon what the court (a neutral party) thinks to be appropriate, regardless of whether the defendant would have adopted the same line of thinking had he been able to view the documents and hear the testimony himself. It is highly plausible the defendant, if given the opportunity (as is guaranteed under the Sixth Amendment) to see and hear *all* of the evidence against him, it may enhance his defense, he may discover additional exculpatory evidence, and he may simply have a better understanding of the “nature and cause”<sup>245</sup> of the government’s case against him allowing him to truly defend himself against the charges.<sup>246</sup>

It is logical to assume that the hidden evidence would contain dates and places of the individual’s alleged contacts with persons believed to be associated with the terrorist organization. With such details the individual could mount a focused defense, perhaps demonstrating presence elsewhere at the times indicated, or offering an innocent explanation for the contacts. Lacking such detail, the defendant may be reduced to providing general character witnesses, completely

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<sup>244</sup> 8 U.S.C. § 1534(e)(3)(D)(iii) (2004).

<sup>245</sup> U.S. Const. amend. VI.

<sup>246</sup> See D. Mark Jackson, *Exposing Secret Evidence: Eliminating a New Hardship of United States Immigration Policy*, 19 Buff. Pub. Interest L. J. 25, 49 (2000).

failing to engage what might prove to be the crucial factual allegations underlying the government's case.<sup>247</sup>

In 1999 Congress first considered what was later to be named the "Secret Evidence Repeal Act of 2000."<sup>248</sup> Therein, Congress reconsidered its previous laws on the use of classified information in deportation proceedings. Under Section two of the bill it states:

The Congress makes the following findings:

- (1) No person physically present in the United States, including its outlying possessions, should be deprived of liberty based on evidence kept secret from that person, including information classified for national security reasons.
- (2) Removal from the United States can separate a person from the person's family, may expose the person to persecution and torture, and amounts to a severe deprivation of liberty.
- (3) Use of secret evidence in immigration proceedings deprives the alien of due process rights guaranteed under the United States Constitution and undermines our adversarial system, which relies on cross-examination as an engine of truth-seeking.<sup>249</sup>

It is apparent from these congressional findings that at least some members of Congress (the bill eventually had 127 co-sponsors in the house (including 102 democrats and 25 republicans))<sup>250</sup> recognized substantial errors in the constitutionality of previously passed anti-terrorism law. But after Congress initially drafted the bill, the attacks of September 11, 2001 occurred and the bills progress halted after while under consideration by the house judiciary committee.<sup>251</sup>

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<sup>247</sup> Martin, *supra* note 235, at 128.

<sup>248</sup> H.R. 2121, 106<sup>th</sup> Cong. (2000).

<sup>249</sup> *Id.*

<sup>250</sup> 1999 Bill Tracking H.R. 2121

<sup>251</sup> *Carnegie Endowment for International Peace Forum*, FEDERAL NEWS SERVICE, Press Conference or Speech.



### iii. *Closed Hearings*

In a September 21, 2001 memorandum released by Chief Immigration Judge Michael Creppy, he instructed all immigration judges and court administrators to close alien removal proceedings in certain “special interest” cases.<sup>252</sup> “No visitors, no family, and no press” were to be allowed in during such proceedings.<sup>253</sup>

These closed proceedings were challenged in two federal cases, one in the Sixth Circuit and one in the Third, with two differing results. In the Third Circuit the appellate court held the procedures constitutional because there was not a sufficiently established practice of opening these courts to the public,<sup>254</sup> while in the Sixth the court held the procedures unconstitutional.<sup>255</sup> The Sixth Court held that years of practice, The Supreme Court has refused certiorari in the case from the Third Circuit, leaving the procedure in tact (at least outside of the Sixth Circuit) for the time being. However, the fact there are differing results in these case is perhaps not as important as the fact it highlights the executive branch is pushing the barriers of the constitutionality of its processes in order to fight terrorism.

The free press has long been a check on government procedures and the arguments for public access to hearings, administrative or criminal, is compelling.

[P]ublic access provides a check on courts. Judges know that they will continue to be held responsible by the public for their rulings. Without access to the proceedings, the public cannot analyze and critique the reasoning of the court. The remedies or penalties imposed by the court will be more readily accepted, or corrected if erroneous, if the public has an opportunity to review the facts presented to the court. In his concurrence, Justice Brennan emphasized this link

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<sup>252</sup> See generally Michael Creppy, *Instructions for Cases Requiring Additional Security* (Sep. 21, 2001), available at <http://news.findlaw.com/hdocs/aclu/creppy092101memo.pdf> (last visited May 20, 2005).

<sup>253</sup> Id. at para. 3

<sup>254</sup> *North Jersey Media Group*, 308 F.3d 198 (3rd Cir. 2002), cert. denied, 123 S.Ct. 2215 (Mem.), 155 L.Ed.2d 1106 (2003).

<sup>255</sup> *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

between access to the courtroom and the popular control necessary in our representative form of government. Although the federal judiciary is not a majoritarian institution, public access provides an element of accountability. One of the ways we minimize judicial error and misconduct is through public scrutiny and discussion.<sup>256</sup>

While these proceedings are administrative and not criminal, the logic of the quote above still rings true. Without access to the proceedings and knowledge of the process, courts may more easily violate a defendant's or a respondent's rights. In some cases, the individuals brought before the deportation panels had been in the United States for lengthy periods, furthering their connection to the United States and the protections of its constitution.<sup>257</sup> And though some of these "removal" cases are exclusion hearings (rather than deportation hearings), the idea that the executive branch may close these removal hearings for both those without any connections to the United States (exclusion hearings) and those with substantial connections to the United States ((deportation hearings) at least outside the Sixth Circuit), is unnerving and, as stated by the Sixth Circuit, contrary to years of precedent and Congressional will.<sup>258</sup> No, these closed hearings are not being held in a criminal setting as were President Fujimori's Faceless Courts (discussed below), nor do they involve United States citizens. But a step in the wrong direction, towards a reduction of due process for individuals with substantial connections to the United States, is still a step in the wrong direction regardless of the immediate gravity.

#### iv. *President Fujimori's Faceless Courts*

Some of the court procedures discussed above (the use of military commissions for terrorist prosecutions and the use of classified information against terrorists by the INS and in the

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<sup>256</sup> *Brown V. Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983).

<sup>257</sup> *Man Held in Detroit as Terrorism Suspect; Somali Immigrant is in High-Security Case*, DETROIT FREE PRESS, Jan. 31, 2004.

<sup>258</sup> *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

Alien Terrorist Removal Court) smack of the same types of abuses that occurred in Peru under the treason statute enacted by President Fujimori. Military Commissions, the use of classified information against alleged terrorists by the INS (including use against lawful residents), the Alien Terrorist Removal Court and the Creppy Memorandum closed hearings (which again, have been used against individuals with substantial connections to the United States) are evidences of a downward trend in protection of individual rights. Granted, in many cases the rights of United States citizens are not being directly abused. But, as discussed above, there are situations in which non-citizens have the same rights as citizens and such slow erosions of due process and constitutional rights in the name of fighting terror, must be checked. In Peru, such abuses culminated in what were to be called “faceless courts.”<sup>259</sup>

As discussed above, civilian courts were to prosecute suspects accused of terrorism<sup>260</sup> while military courts were to prosecute suspects accused of treason (which was actually another terrorism statute with more specific crime elements).<sup>261</sup> Both courts, however, were to have special procedures put in place to protect the officials involved in the process, especially the judges. The hearings were to be conducted in secret<sup>262</sup> and the judges were to be invisible to the defendant and his attorney; the judges were placed behind a mirror and special microphones distorted their voices, thereby rendering the judges “faceless.”<sup>263</sup> As an additional protective

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<sup>259</sup> Decreto Ley 25475, *supra* note 143 at art. 17.

<sup>260</sup> Decreto Ley 25659, *supra* note 159, at art. 4.

<sup>261</sup> Decreto Ley 25475, *supra* note 143, at art. 15, 16.

<sup>262</sup> See generally Inter-American Commission on Human Rights, *Organization of American States, Second Report on the Situation of Human Rights in Peru*, Intro, available at <http://www.cidh.oas.org/countryrep/Peru2000en/TOC.htm> (last visited May 20, 2005) [hereinafter Inter-American Commission].

<sup>263</sup> *Id.*

measure, neither side could call any investigators who took part in the gathering of evidence as witnesses in the hearing.<sup>264</sup> President Fujimori excused these deviations from the rights otherwise owed an accused under the Peruvian Constitution as a necessary result of the special emergency situation that existed.<sup>265</sup>

v. *Cleaning up*

President Fujimori's policies were successful in diminishing the terrorist threat in Peru.<sup>266</sup> But while successful against the terrorist threat, the legal consequences have been difficult and long-lasting. President Fujimori himself admitted that innocent people were convicted by the faceless courts he initiated.<sup>267</sup> President Fujimori has stated:

The . . . law was misapplied by civilian and military judges and prosecutors in some cases in which these unjust detentions took place. We are following up on this matter. We recognize that such a situation exists and we are doing all we can. We would like to have a mechanism soon to allow us to bring justice to those who are unjustly in detention. We don't doubt that such people exist.<sup>268</sup>

The mechanism eventually adopted to right the wrongs committed by the Fujimori administration was a "Comisión de Verdad y Reconciliación [Truth and Reconciliation Commission]" created by the caretaker government of Valentín Paniagua after President Fujimori was removed from office.<sup>269</sup> Through the Truth and Reconciliation process, it was discovered that hundreds of innocent people were indeed convicted in faceless courts.<sup>270</sup>

According to the current head of the Peruvian military's attorneys, the military is now

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<sup>264</sup> Decreto Ley 25475, *supra* note 143 at art. 13(c).

<sup>265</sup> See Inter-American Commission at ch. 4

<sup>266</sup> Interview by NBC of President Alberto Fujimori, Washington D.C. (May 22, 1996).

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> Resolución Suprema 304-2000 (Dec. 9, 2000) (Peru).

cooperating with civilian authorities to review each of the cases wherein it is suspected the defendant was wrongfully convicted and either immediately absolve those individuals or re-try them in civilian courts.<sup>271</sup>

#### IV. CONCLUSION

While it is true the status of anti-terrorism law in the United States is not as draconian as the law under the Fujimori regime in Peru, neither is the state of terrorism in the United States as critical as the state of terrorism was at the time President Fujimori took office. After President Fujimori acknowledged the possibility that innocent people had been convicted by the faceless courts, he added: “Don’t forget that we have withstood twenty-three years of terrorism, with car bombs like the one in Oklahoma taking place, on average, once a week.”<sup>272</sup>

Given the similarities between some of the legislation and policy in the United States, and practices in Colombia and Peru, there is some reason to be concerned. Relaxed rules governing investigations, prosecutions in military courts, secret alien removal proceedings, and relaxed evidentiary rules throughout, are reminiscent of investigative techniques and the faceless courts of Peru.

While many of the statutes cited above were passed prior to September 11, 2001, many have been amended in its aftermath to allow the executive branch greater authority in the name of the war on terror. Such a reactionary response to terror may be effective in the short term, but may also bring about a repentance process similar to what Peru has experienced in the past few years and the long-term collateral damage might be extensive

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<sup>271</sup> Interview with Alvaro Huanqui Medina, Chief Military Attorney for the Peruvian Military, in Lima, Peru (June 2002).

<sup>272</sup> Interview by NBC of President Alberto Fujimori, *supra* note 266.

And the executive branch is not, in the majority of cases, to blame. President Bush is not President Fujimori, and any statement the type of presidential coup which occurred in Peru and which was threatened in Colombia is occurring now would be absurd. For the most part, these laws cited above have been passed and/or blessed by Congress allowing for a transfer or delegation of power from the legislative and judicial branches to the executive. Defeating terrorism is crucial to the survival of our country. But as stated in the beginning, the checks and balances provided by the Constitution are also crucial to the maintenance of our democracy. All three branches of the government must be willing to complete their respective duties without either excessively infringing upon or delegating responsibility to the others.

Though currently the United States may still claim an overall adherence to law which exceeds that in Peru and Colombia (as evidenced by the fact that such tools as the Alien Terrorist Removal Court remain as of yet, unused), the United States seems to be on a downward trend over the last few decades. Colombia seems to be in line with a prior disregard for the rule of law, while Peru, historically one of the worst offenders in this hemisphere is on a somewhat repentant upswing. In the long run, it's not so much where you are on the scale, but in which direction you're headed.

Thus, the gap between the law and practice in the United States and law and practice in South America has been narrowed. If adherence to law and protection of citizens' rights represents the moral high ground, we must be wary of the small steps in the wrong direction we have taken, and, though the path be more difficult, proceed with caution and care down the path which will lead us away from our neighbor's mistakes to the level of humanity and justice our nation has always represented. Checks and balances, though cumbersome at times, are meant to

protect government from government which, in the long run, can be more destructive than any terrorist.